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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,
Petitioner,

v.

ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Secretary of the United States Department of Labor ("Secretary") is barred under the doctrine of res judicata from bringing a claim, as a representative of the plan, to recover employee benefit plan assets where that claim was settled by a court-certified class of all participants in the plan, as a representative of the plan, in prior litigation.

PARTIES TO THE PROCEEDINGS IN THE COURT OF APPEALS

The parties to the consolidated appeals are named in the caption of this petition, except for William A. Fickling, Jr., Bank of South Macon, as trustee under agreement of William A. Fickling, Jr., Self-Employed Retirement Plan, Neva L. Fickling, William A. Fickling III, Jane F. Skinner, Julia C. Fickling, Roy H. Fickling, Claudia F. Fickling, Jane Dru Fickling, Katherine M. Wright, Katherine Darden Wright, Virginia M. Rabun, W&J Capital Company, Ltd., and J&R Capital Company, Ltd.

RULE 29.1 LISTING

Petitioner South Carolina National Bank, now Wachovia Bank, National Association, is a wholly-owned subsidiary of Wachovia Corporation. Petitioner South Carolina National Bank has no non-wholly-owned subsidiary corporations.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner South Carolina National Bank ("SCNB") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in *Herman v. South Carolina National Bank*, Nos. 97-6058 and 97-6154 (11th Cir. May 15, 1998).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, reported at 140 F.3d 1413, appears at A. 1a. The Memorandum Opinion of the United States District Court for the Northern District of Alabama, which is not reported, appears at A. 29a. The judgment order of the United States District Court for the Northern District of Alabama and the District Court's order dismissing the Secretary's claims for monetary relief appear at A. 46a and A. 43a, respectively. The order of

the Court of Appeals denying the petitions for rehearing and suggestions for rehearing en banc appears at A. 40a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 15, 1998. A. 1a. The petitions for rehearing and suggestions for rehearing en banc were denied on August 10, 1998. A. 40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves sections 409(a), 502(a)(2), 502(a)(5) and 502(h) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), 29 U.S.C. §§ 1109(a), 1132(a)(2), 1132(a)(5), 1132(h). These statutory provisions are set forth at A. 48a-A. 49a.

STATEMENT OF THE CASE

Petitioner SCNB is a national banking association. In 1988, SCNB agreed to serve as trustee of the Charter Medical Corporation Employee Stock Ownership Plan (the "Charter ESOP") in return for a fixed fee. An ESOP is a form of employee benefit plan designed to invest primarily in the stock of its sponsoring company, *see* ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6), here Charter Medical Corporation ("Charter").

On September 1, 1988, SCNB entered into an agreement to purchase $80 million worth of Charter stock from the company's founder, William A. Fickling, Jr., and related persons (the "Fickling Defendants") at a later date. Charter, in turn, agreed to loan the $80 million purchase price to the ESOP.

The $80 million transaction was scheduled to close in February 1990. At the time, Charter's stock was not publicly traded. Consequently, SCNB hired one of the region's largest financial advisors, Interstate/Johnson Lane Corporation ("Interstate"), to value Charter's stock

as of the date of the proposed purchase. Interstate assigned a value of $43.16 per share, and the transaction closed on that basis.

Unbeknownst to SCNB, however, Charter's stock was worth less than $43.16 per share. The Charter ESOP had overpaid the Fickling Defendants.

As a result, in May 1991, Frances Knop and Millie Smith sued SCNB, Interstate, Charter and others on behalf of an alleged class of all participants in the Charter ESOP (the "*Knop* Action"). The complaint alleged that SCNB had breached its fiduciary duties under ERISA by relying upon the Interstate valuation and, as a result, allowing the Charter ESOP to overpay for the Fickling Defendants' Charter stock. The complaint sought recovery on behalf of the Charter ESOP of all monetary losses that resulted from the overpayment pursuant to section 409(a) of ERISA, 29 U.S.C § 1109(a). R1-8, ¶ 92. Federal jurisdiction over the ERISA claims was invoked under section 502(e) of ERISA, 29 U.S.C. § 1132(e).

As required by section 502(h) of ERISA, 29 U.S.C. § 1132(h), the *Knop* Action plaintiffs served a copy of their complaint on the Secretary of Labor. R7-142-Tab E at 2, ¶ 2. The Secretary thereupon had the right "to intervene in [the] action." ERISA § 502(h), 29 U.S.C. § 1132(h). But the Secretary did not intervene, directly. Instead, she pursued discovery outside of the litigation, invoking her investigative authority under section 504 of ERISA, 29 U.S.C. § 1134. In that connection, the Secretary required SCNB to turn over all contemporaneous documents in its file, including SCNB's attorney-client communications. R7-146 (Second Gantt Aff.) ¶ 12. To induce SCNB to surrender its privileged documents, the Secretary advised SCNB that a plan trustee like SCNB has a common law duty to disclose attorney-client communications to the plan's beneficiaries. The Secretary further asserted that "SCNB may not assert the privilege

vis-a-vis the Secretary of Labor since the Secretary is acting on behalf and in the interests of the plan participants and beneficiaries." R7-142-Tab F.

In March 1992, the parties to the *Knop* Action entered into a proposed settlement agreement. R3-75. The proposed agreement called for Charter (which had agreed earlier to indemnify SCNB and others) to pay more than $12 million in cash to the Charter ESOP and to forgive $30 million of the loan it had made to the ESOP to effect the stock purchase. *Id.* In return, the agreement called for all parties to exchange releases and cross-releases, specifically including releases of all claims for money damages asserted on behalf of the Charter ESOP under section 409(a) of ERISA, 29 U.S.C. § 1109(a). R3-75-15, 17.

Consistent with this arrangement, the district court ordered the defendants to notify all class members of the proposed settlement and to invite all of the ESOP's participants and their representatives to appear and be heard at a fairness hearing. R3-76. The defendants did so and, consistent therewith, specifically notified the Secretary of the fairness hearing and of the invitation to attend. R7-142-Tab J; R7-146 (Second Gantt Aff.) ¶ 16.

At the fairness hearing on April 30, 1992, the district court heard testimony from the parties and from other class members concerning the proposed settlement. The Secretary of Labor, however, did not appear or object. Instead, she sent a letter to the parties stating that, while she did not consider herself bound by a private settlement, she did "not wish to make the chances of settling the Knop Action any less likely . . . ." R7-142-Tab J. Following the hearing, the district court entered Findings of Fact and Conclusions of Law, and an Order and Final Judgment approving the settlement agreement and releases. R4-99, R4-100.

Seven weeks later, the Secretary sent letters to SCNB and to the Fickling Defendants demanding that they

"undo" the $80 million transaction and cause the ESOP to return all shares of Charter stock that it had acquired in the transaction, even though the *Knop* Action settlement decree allowed the ESOP and its participants to keep those shares. R7-142-Tab N. Thereafter, the Secretary filed a civil action of her own against SCNB and the Fickling Defendants. The Secretary alleged that SCNB had breached its fiduciary duty under ERISA by relying upon the Interstate valuation and, as a result, by allowing the Charter ESOP to overpay for the Fickling Defendants' stock. Like the *Knop* Action plaintiffs, who were participants in the ESOP, the Secretary sought recovery of monetary losses from SCNB for the Charter ESOP, pursuant to section 409(a) of ERISA, 29 U.S.C. § 1109 (a). R1-8, ¶ 92; R7-142-Tab O. Unlike the *Knop* Action plaintiffs, the Secretary also sought a variety of equitable remedies designed to prevent future violations of the statute. *See id.*

Subsequently, the Secretary and SCNB entered into a consent order disposing of the Secretary's claims for injunctive and declaratory relief. R8-183. The claim for monetary relief, however, came before the district court on cross-motions for summary judgment. After reviewing those motions, the district court granted SCNB's motion and dismissed the Secretary's claim to recover additional monetary relief from SCNB. A. 43a. In doing so, the district court explained that because the Secretary "seeks to recover the same alleged losses on behalf of the same ESOP under the same section of ERISA and based on the same stock purchase as the participants sought and settled" in the *Knop* Action, her monetary claim against SCNB is barred under the doctrines of representative claim preclusion (res judicata) and release, among others. A. 33a.

The court of appeals reversed. A. 1a. In doing so, the court acknowledged that the Secretary had, in fact, sought recovery for the Charter ESOP of the same alleged monetary losses settled by the *Knop* Action participants

and beneficiaries on behalf of the Charter ESOP. Nonetheless, the court concluded that the settlement decree did not bar the Secretary from suing SCNB again for the same alleged losses. According to the court of appeals, the general rules of res judicata "do[] not apply here" because the Secretary has "national public interests" that "are wholly distinct and separate from those of private litigants . . . ." A. 20a.

REASONS FOR GRANTING THE PETITION

The Court of Appeals' Decision to Exempt From the Doctrines of Res Judicata and Release an ERISA Claim to Recover Money Damages on Behalf of a Private Pension Plan When—and Simply Because—the Claim Is Brought by the Secretary of Labor Is Inconsistent With Decisions of This Court, Decisions of Other Circuits, the Intent of Congress in Enacting ERISA, and the Public Policy Interest in the Finality of Litigation.

This case presents a straightforward question: Whether a final judgment that resolves the purely private interest embodied in an award of money damages to a private party bars the government, under the doctrine of representative claim preclusion (res judicata), from recovering additional money damages for that same private party in a subsequent action. The court of appeals held that the doctrine does not apply when, as here, the government's action seeks to enforce a "federal statute that implicates both public and private interests." A. 22a. That holding, however, conflicts with settled authority of this Court and with precedents adopted by other Circuits recognizing that a final judgment or settlement disposing of a claim for private pecuniary relief bars the government from later seeking additional money damages for the benefit of the same private party. *E.g., Chicago, Rock Island & Pac. Ry. v. Schendel,* 270 U.S. 611, 619 (1926) (where there has been a "previous adjudication[] against the real party in interest" the "government should be held estopped" from bringing suit as a representative of that private party). And this is so even when the government

sues under a statute, such as those statutes dealing with racial or age discrimination, that implicate both public and private interests. *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (private individual's suit bars recovery by the EEOC of backpay, liquidated damages, and reinstatement in his behalf, even though EEOC retains independent right to sue for injunctive relief needed to vindicate the broader public interest). This Court's intervention is necessary to restore uniformity to this important area of federal law and to preserve the integrity of voluntary settlement agreements in federal litigation.

In this case, the res judicata issue surfaced in a dispute arising under ERISA's civil enforcement provisions, including sections 409(a) and 502(a) of ERISA, 29 U.S.C. §§ 1109(a), 1132(a). Section 409(a) of ERISA imposes personal liability on a fiduciary who breaches any of his duties or responsibilities with respect to an employee benefit plan. It provides in relevant part that the fiduciary may be "personally liable to make good to such plan any losses to the plan resulting from each such breach, ..." 29 U.S.C. § 1109(a). A civil action to obtain appropriate relief under section 409(a) of ERISA is authorized under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2).

Section 502(a)(2) authorizes four classes of possible plaintiffs to bring a claim for relief under section 409. The claim may be brought "by the Secretary, or by a participant, beneficiary or fiduciary" of the plan. ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). If the claim is brought by a participant, beneficiary or fiduciary, "[a] copy of the complaint . . . shall be served upon the Secretary" and the Secretary "shall have the right in [her] discretion to intervene in any [such] action . . . ." ERISA § 502(h), 29 U.S.C. § 1132(h).

In addition, Congress authorized civil actions by the Secretary of Labor, under section 502(a)(5) of ERISA, "(A) to enjoin any act or practice which violates any

provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title . . . ." 29 U.S.C. § 1132(a)(5).[1]

Here, there is no claim by the Secretary for broader equitable relief against SCNB under section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5). The Secretary settled her claims for injunctive and declaratory relief against SCNB. The only disputed claim against SCNB is a claim by the Secretary under section 502(a)(2) of ERISA to recover additional money damages for the Charter ESOP pursuant to section 409(a) of ERISA. In fact, the Secretary has so conceded. R17-169 at 42, 47.

That claim was, as the district court observed, the very same claim, under the very same statutory provisions, to recover the very same losses, as the claim resolved by a class of all Charter ESOP participants in the *Knop* Action. For this reason, as shown below, the Secretary's claim for additional monetary relief from SCNB is barred under the doctrine of res judicata.

A. The Decision Below Conflicts With Decisions of This Court and Other Circuits Recognizing That a Prior Judgment or Settlement on Behalf of a Private Party Bars Subsequent Claims by the Government to the Extent That the Government Seeks Additional Monetary Relief for That Private Party.

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or those in privity with them from relitigating claims that were, or could have been raised in that action. *Nevada v. United States*, 463 U.S. 110, 134-35 (1983); *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440

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[1] This section, and its analog for private litigants, ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorize the recovery of equitable relief only, not money damages. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 260-61 (1993).

U.S. 147, 153 (1979).[2] "One relationship long held to fall within the concept of privity is that between a nonparty and party who acts as the nonparty's representative." *EEOC v. United States Steel Corp.*, 921 F.2d 489, 493 (3d Cir. 1990). *See generally Chicago, Rock Island and Pac. Ry. v. Schendel*, 270 U.S. 611, 620 (1926) (privity is present in representative actions where "parties nominally different [are], in legal effect, the same"). In other words, "[a] nonparty whose interests have once been represented is not free to relitigate the same interests either in person *or through another representative.*" 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4454, at 462 (1981) (emphasis added).

These bedrock principles of law apply equally here. The *Knop* Action resolved all claims brought by a class of all participants in the Charter ESOP, acting as representatives of the plan, under section 502(a)(2) of ERISA to recover money damages from SCNB on behalf of the plan pursuant to section 409(a) of ERISA. The Secretary brought the very same action, under the very same statutory provisions, to obtain the very same relief. That relief was solely to recover money damages for the plan as a representative of the plan.

Indeed, a party, including the Secretary of Labor, may not, under sections 409(a) and 502(a)(2) of ERISA, seek relief for anyone other than the plan and, in doing so, may not act in a capacity other than as a representative of the plan. This was made abundantly clear in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). There, this Court stated that section

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[2] The same is true under the doctrine of release, but as a matter of the parties' contract independent from the court's final judgment. *See generally Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29, 31-32 (1st Cir. 1991) ("It is beyond cavil that a suit can be barred by the earlier settlement of another suit in either of two ways: res judicata or release. The defenses are separate and distinct.") (internal citations omitted).

409(a) of ERISA permits recovery only for "the plan as an entity." *Id.* at 140. The Court explained that "[i]nclusion of the Secretary of Labor [among the persons authorized to sue under section 502(a)(2)] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole." *Id.* at 142 n. 9.

Because the Secretary's claim against SCNB under sections 409(a) and 502(a)(2) of ERISA was, in fact and in accordance with law, brought in just this capacity, as a "representative . . . on behalf of the plan" to recover losses of the plan, *id.* at 142 n.9, that claim by the Secretary was barred, under the doctrines of res judicata and release, by the prior settlement of the very same action under the very same provisions for the very same relief by a class of all participants in the plan as "representative[s] . . . on behalf of the Plan." Id. at 142 n.9.

This conclusion accords with this Court's decision in *Chicago, Rock Island & Pacific Railway v. Schendel,* 270 U.S. 611. There, the Court reaffirmed and applied the principle that a representative claim, like the Secretary's here, is barred under the doctrine of res judicata by a prior disposition of the represented party's claims in a separate case. *Id.* at 618-22. In doing so, the Court discussed, with approval, an earlier decision expressly recognizing that res judicata applies equally to representative actions brought by the government: "[W]here a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication . . . in a suit against [the private party] personally, determining the same issues, was available as an estoppel against the government." *Id.* at 619.

This principle plainly controls here. Because a court-certified class of all participants in the Charter ESOP obtained a final judgment disposing of the ESOP's claim for monetary relief pursuant to section 409(a) of ERISA, 29 U.S.C. § 1109(a), "the government should be held

estopped" from relitigating that claim. *See Schendel*, 270 U.S. at 619.

The court of appeals here failed to apply this principle. By doing so, it placed itself directly in conflict with decisions of the First, Third, Fifth, Sixth, Seventh, and Ninth Circuits, all of which have recognized that the government may not relitigate in a representative capacity a private claim that the private party has previously litigated and resolved.

In *EEOC v. Huttig Sash & Door Co.*, 511 F.2d 453 (5th Cir. 1975), the Fifth Circuit held that the dismissal of a private individual's suit for monetary relief precludes the EEOC from asserting monetary claims on behalf of that individual. Although holding that the dismissal did not cut off the EEOC's independent and separate right to enjoin any discriminatory practices of the defendant, the court concluded that "the EEOC would be barred from filing suit . . . on behalf of [a] person who had had his suit adjudicated. Res judicata would prevent such a suit." *Id.* at 456.

To the same effect, the Fifth Circuit later held that "the [EEOC] may not bring a second suit based on the transactions that were the subject of a prior suit by a private plaintiff, unless the [EEOC] seeks relief different from that sought by the individual." *Truvillion v. King's Daughters Hosp.*, 614 F.2d 520, 525 (5th Cir. 1980); *see also EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *New Orleans Steamship Assoc. v. EEOC*, 680 F.2d 23, 25 (5th Cir. 1982) (to the same effect). This result necessarily follows, as the Seventh Circuit aptly summarized in *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, because "there is privity between the EEOC and individuals for whom it seeks individual benefits." *Id.* at 1291.

For this same reason—and under a host of different statutory frameworks—other courts have routinely barred the government from recovering monetary relief on behalf

of private persons who earlier recovered or settled the same monetary claim in their own name. *See, e.g., In re Imperial Corp. of Am.*, 92 F.3d 1503, 1509 (9th Cir. 1996) (court-approved settlement of a derivative action on behalf of a failed financial institution to recover losses incurred by that institution as a result of the failure bars a subsequent action by the FDIC to recover the same losses); *EEOC v. United States Steel Corp*, 921 F.2d 489, 496 (3d Cir. 1990) ("when the EEOC seeks to represent grievants by attempting to obtain private benefits on their behalf, the doctrine of representative claim preclusion must be applied"); *NLRB v. Donna-Lee Sportswear Co.*, 836 F.2d 31, 37-38 (1st Cir. 1987) (judgment in private collection action brought by pension fund bars later NLRB claim for recovery of the same alleged amounts); *EEOC v. Kimberly-Clark Corp.*, 511 F.2d 1352, 1361 (6th Cir.), *cert. denied*, 423 U.S. 994 (1975) (although EEOC remains free to sue for injunctive relief to vindicate the broader public interest in preventing illegal employment discrimination, prior settlement by individual grievants "may well limit the scope of relief that the EEOC may seek" for the settling parties); *FTC v. AMREP Corp.*, 705 F. Supp. 119 (S.D.N.Y. 1988) (Federal Trade Commission's claims which seek compensation or other redress in favor of individuals who have previously settled are barred by res judicata).

But the court of appeals in this case relied upon a different Fifth Circuit decision, *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56 (5th Cir. 1979), plus three decisions of this Court, *Hathorn v. Lovorn*, 457 U.S. 255 (1982), *City of Richmond v. United States*, 422 U.S. 358, 376 n.6 (1975), and *Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). According to the court below, these cases do not bar, under the doctrine of res judicata or release, a government agency from bringing a separate, independent action

on behalf of the public interest in situations analogous to the one here.

To the extent these cases stand for that proposition, however, they are completely inapposite. No one disputes that the Secretary retained her right to sue for broader equitable and injunctive relief on behalf of the public interest. She retained that claim despite the *Knop* Action settlement, and obtained a consent order against SCNB disposing of it. R8-183. The issue here, however, was whether the purely *private* component of the Secretary's lawsuit—her claim under section 502(a)(2) of ERISA "as a representative of the plan" for money damages on behalf of the plan under section 409(a) of ERISA—should proceed where a class of all participants in the plan had earlier disposed of the plan's money damages claim through a court-approved settlement. And, the four cases relied upon by the court of appeals do not address this kind of governmental action, whereas *Schendel, Huttig Sash & Door Co., Harris Chernin, Imperial Corp. of America,* and the other cases cited above squarely do.

Three of the four cases cited by the court of appeals—*City of Richmond v. United States*, 422 U.S. 358, *Hathorn v. Lovorn*, 457 U.S. 255, and *United States v. East Baton Rouge Parish School Board*, 594 F.2d 56—involve claims by the government to enforce the "preclearance" requirement of section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c), which provides for affirmative approval by the Attorney General, in some circumstances, of certain voting plans. These cases do not involve government claims for monetary relief, much less monetary relief for the benefit of specific voters. Instead, they involve claims to remedy voting procedures on behalf of the larger body politic. The government's claim to protect the body politic's voting rights in these cases is fundamentally different from the purely private claim that the Secretary pursues under section 502(a)(2) of ERISA when she seeks recovery of money damages for "the plan as an entity" under section 409(a) of ERISA as a "repre-

sentative . . . on behalf of the plan." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 140, 142 n.9. To the extent *City of Richmond*, *Hathorn* and *East Baton Rouge Parish* have any relevance here, they merely show, as the Fifth Circuit stated in *East Baton Rouge Parish* that "the United States has an interest in enforcing federal [election] law that is independent of any claims of private citizens." *East Baton Rouge Parish*, 594 F.2d at 58.

The same is true for the fourth and final case mistakenly relied upon by the court below, *Sam Fox Publishing Co. v. United States*, 366 U.S. 683. In *Sam Fox Publishing*, the Court held that members of an association "were not entitled to intervene as of right" in an action by the association for antitrust violations under the Sherman Act. *Id.* at 690. The Court reasoned, in reaching that decision, that the individual members were "not bound by the consent judgment in these proceedings." *Id.* at 689. Explaining why, the Court noted with approval its earlier decision under the Clayton Act in *United States v. Borden Co.*, 347 U.S. 514 (1954):

> It was there stated in clearest terms that "private and public actions were designed to be cumulative, not mutually exclusive." (*id.* 347 U.S. at 518), and, quoting from *United States v. Bendix Home Appliances, Inc.*, (DC NY) 10 F.R.D. 73, 77, "' . . . [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.'" *Id.* 347 U.S. at 518, 519.

Sam Fox Publ'g Co., 366 U.S. at 689. This Court went on to say in *Borden* that the "Attorney General" is charged under section 15 of the Clayton Act, 15 U.S.C. § 25, "with the duty of instituting equity proceedings to prevent and restrain violations of certain of the anti-

trust laws." *Borden*, 347 U.S. at 518. Then again, the Court pointed out, "a private plaintiff may obtain injunctive relief" under section 16 of the Act, 15 U.S.C. § 26, "against such violations only on a showing of 'threatened loss or damage'; and this must be of a sort personal to the plaintiff." *Id* (citation omitted). In short,

> [t]he Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served. These private and public actions were designed to be cumulative, not mutually exclusive. S. Rep. No. 698, 63d Cong., 2d Sess., 42.

Id.

To summarize, the cases relied upon by the court below establish that the doctrine of res judicata cannot bar the government from enforcing separate, independent claims under the Voting Rights Act, the Sherman Act or the Clayton Act on behalf of a broader public interest. But the doctrine *does* apply in a case, such as the one here, where res judicata is interposed by a defendant to bar the government from representing the interests of a private party that has already settled those interests in prior litigation under the very same statutory provisions upon which the government sues.

Here, unlike the situations in *City of Richmond, Hathorn, East Baton Rouge Parish* and *Sam Fox Publishing*, the government has the very same interest as the private parties, such as the class of all Charter ESOP participants, who commence an action under section 502(a)(2) of ERISA as a representative of the plan for monetary recovery on behalf of the plan under section 409(a) of ERISA. This is why Congress stated that "the Secretary *or* . . . a participant, beneficiary or fiduciary" may commence an action under section 502(a)(2) to recover a plan's losses pursuant to section 409(a) of ERISA.

Each one has the very same interest—to represent the plan and to recover its losses as a representative of the plan. Indeed, this Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell* says so: "Inclusion of the Secretary of Labor [among the persons authorized to sue under section 502(a)(2)] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole." *Russell*, 473 U.S. at 142 n.9.

Of course, the Secretary also has independent authority under section 502(a)(5) of ERISA to act in the public interest by commencing an action "to enjoin any act or practice which violates any provision of this title, or . . . to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title . . . ." 29 U.S.C. § 1132(a)(5). Relying on that authority, the Secretary extracted a consent order from SCNB that permanently enjoins the Bank from serving as a fiduciary or service provider to the Charter ESOP and from acting as a discretionary trustee under certain other circumstances. R8-183. That order was never disputed below because it was entered pursuant to the Secretary's independent authority to obtain relief under section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5). That authority, borrowing from this Court's opinion in *Borden*, "[was] designed to be cumulative, not mutually exclusive" with the purely private right of recovery provided through sections 502(a)(2) and 409(a) of ERISA. *Borden*, 347 U.S. at 518.

But where the Secretary brings an action under section 502(a)(2) of ERISA to recover losses to the plan, as a representative of the plan, after the same plan has already settled its claim under section 502(a)(2) for those losses, that is quite another matter. In that situation, the plan, or its representatives who sue under section 502(a)(2) of ERISA, are required to serve "[a] copy of the complaint . . . upon the Secretary of Labor" and the

Secretary is entitled "in his discretion to intervene" in the private litigation. ERISA § 502(h), 29 U.S.C. § 1132(h). The court below incorrectly held that the Secretary always retains an independent right to commence a second section 502(a)(2) lawsuit for money damages on behalf of a private plan, even in the face of a settlement of the same claim by private participants under the same statutory provisions on behalf of the same plan. If that proposition were true, however, then Congress surely would not have deemed it mandatory to afford the Secretary timely notice of the private lawsuit so that she would have a timely opportunity to intervene as a matter of right in that lawsuit. Rather, by adopting section 502(h) of ERISA, and requiring that the Secretary receive notice of litigation by private parties and entitling the Secretary to intervene therein, Congress recognized that the Secretary, as well as plan participants, may equally and only bring an action under section 502(a)(2) of ERISA to recover assets on behalf of the plan pursuant to section 409(a) of ERISA, as representatives of the plan. In this circumstance, Congress made it abundantly clear that these parties have no interest other than as representatives of the plan.

The court of appeals disagreed and relied upon three cases that expressly address sections 409(a) and 502(a)(2) of ERISA, *Campbell v. Hall-Mark Electronics Corp.*, 808 F.2d 775 (11th Cir. 1987), *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984), and *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682 (7th Cir. 1986) (en banc). But these cases provide no real basis for the court's decision to abandon the doctrine of representative claim preclusion.

Campbell involved an appeal by the Secretary from an order by the district court denying her motion to intervene at the eleventh hour in an action by a class of plan participants under section 502(a)(2) of ERISA. The court of appeals affirmed the denial and, in explaining

why, left no doubt about the distinct character of a claim under section 502(a)(2) of ERISA for private pecuniary relief on behalf of the plan and a claim by the Secretary under section 502(a)(5) for broader equitable relief benefiting the public interest: "Possessing actual knowledge that the private parties were proceeding toward a settlement, the Secretary could not then bury his head in the sand and later claim that he was unaware of the potential adverse effect such a settlement might have on his own interests." *Campbell,* 808 F.2d at 777. Further, "[i]ntervention at this point would only jeopardize a legitimately negotiated, accepted, and approved settlement." *Id.* at 779. Finally—

> [t]he proposal provides a substantial monetary offer to all plan participants, the very people the Secretary seeks to protect. In addition, the Secretary *certainly may continue to litigate his own case in pursuit of whatever broader public policy interests he deems important.*

Id. (emphasis added).

The court in *Cunningham* identified the same distinction between claims for a purely private recovery on behalf of a pension plan under section 502(a)(2) of ERISA and claims by the government under section 502(a)(5) for broader equitable relief to protect the public interest at large. The Secretary in *Cunningham* brought an action against a number of fiduciaries of another ESOP to recover the ESOP's losses under sections 502(a)(2) and 409 of ERISA. The Secretary also "sought to enjoin the defendants from violating ERISA and from serving as fiduciaries under ERISA for five years" pursuant to section 502(a)(5) of ERISA. *Cunningham,* 716 F.2d at 1460. At about the same time, a number of the ESOP's participants filed a private action against the same fiduciaries to recover the same losses under, again, sections 502(a)(2) and 409(a) of ERISA.

The private action settled during the pendency of an appeal of the action by the Secretary of Labor.

Based on the private settlement, the fiduciaries argued on appeal that the Secretary's lawsuit—in its entirety—was barred by the doctrines of res judicata and mootness. The court of appeals rejected the blanket application of those doctrines because, in the court's words, "the settlement agreement did not render all relief sought by the Secretary either unnecessary or impossible to achieve." *Id.* at 1461. The court went on to point out that the—

> injunctive relief sought by the Secretary is not limited to actions affecting the Metropolitan ESOP. He [the Secretary] asks that if violations of ERISA are found, the appellees be enjoined from violating the statute in the future and, more specifically, that they be enjoined from serving as fiduciaries under *any* ERISA plan for a five-year period.

Id. at 1461. Consistent therewith, the court also rejected the assertion that all of the Secretary's claims are barred by the doctrine of res judicata. The *Cunningham* court noted that as a "general principle of law" the "United States will not be barred from independent litigation by the failure of a private plaintiff." *Id.* at 1462. Not surprisingly, the court went on to explain that "[t]his principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens . . . ." *Id.* Explaining further, the court then noted that—

> [t]he cases that have developed this principle have often involved statutory schemes like ERISA that provide for private enforcement of individual rights as well as suits by the government to vindicate the public interest in compliance with the law. For example, in suits to enforce Section 5 of the Voting Rights Act, the Attorney General of the United States is not bound by the results of prior litigation of the same issues by private parties. *Hathorn v.*

> *Lovorn*, 457 U.S. 225, 268 n.23 (1982); . . . *City of Richmond v. United States*, 422 U.S. 358, 373 n.6 (1975); . . . *East Baton Rouge Parish, supra.*

Id. From this, the court asserted that—

> [a]s in those cases, the Secretary in the present case seeks to vindicate a public interest that is broader than the interests of the plaintiffs in the [class action]. Those plaintiffs were interested in recouping only their *own* economic losses; the Secretary seeks to determine the legality of specific conduct and to prevent those who have engaged in illegal activity from causing loss to *any* future ERISA plan participant. Thus, although the monetary settlement sought in the prior litigation may have achieved the goals of the private plaintiffs, it is clearly inadequate to vindicate the broader interest of the government.

Id. at 1462. Concluding, the court of appeals then cited a number of EEOC res judicata cases for the proposition that the prior private settlement would nonetheless affect "the scope of relief" available to the Secretary on remand. *Id.* at 1462 n.10.

In short, the court in *Cunningham* recognized that Congress authorized the Secretary to act in the broader interest of the public by exercising her equity powers under section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5). Where the Secretary does so, she is not precluded from exercising that power by a prior judgment obtained by a private party who sought to vindicate private rights. Nothing in the decisions in *Campbell* and *Cunningham* suggests otherwise. In fact, a careful reading of those cases indicates a recognition that, in the words of the court in *Cunningham*, "[t]he cases that have developed this principle [of a division between the public and private interest] have often involved statutory schemes like ERISA that provide for private enforcement of individual rights as well as suits by the government to vindicate the public interest in compliance with the law." *Cunningham*, 716 F.2d at 1462.

This case, however, raises a different circumstance involving a different provision of ERISA. Here, both the *Knop* Action participants and the Secretary commenced an action under section 502(a)(2) of ERISA to recover losses to the Charter ESOP pursuant to section 409(a) of ERISA. This Court has made it clear that when the Secretary and participants bring such an action, they *both* act in the interest of the plan as representatives of the plan. *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 140. Indeed, citing this identity of interest, the Secretary asserted below that the attorney-client privilege could not be raised as a bar to her review of certain information obtained by SCNB because, like SCNB, she also is "acting on behalf and in the interests of the plan participants and beneficiaries." R7-142-Tab F.

Finding this acknowledgement somewhat uncomfortable, the court below turned to the decision of the Seventh Circuit in *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, and concluded that it describes a public interest component to section 502(a)(2) suits by the Secretary for money damages on behalf of a private plan. It is true that the Seventh Circuit stated in *Fitzsimmons* that "nothing in the statute [including, presumably, sections 502(a)(2) and 409(a)] equates the Secretary's interests with those of private litigants so as to justify the application of *res judicata* to bar the Secretary from bringing a separate claim where private litigation has begun or been concluded." *Id.* at 690. The defendant had apparently argued below that sections 502(a)(2) and 409(a) were an exception because those provisions authorized both the Secretary of Labor and private parties to commence an action on behalf of a plan to recover losses to the plan. The defendant had apparently further argued that this Court had made it perfectly clear in *Russell* that, when suing under those provisions, the Secretary of Labor and private parties were acting on behalf of the plan as plan representa-

tives. Responding to this argument, the Seventh Circuit stated that the "Supreme Court's decision in *Massachusetts Mut. Life Ins. Co. v. Russell*, . . . does not support a result contrary to that which we reach here." *Id.* at 691 n.12. However, the Seventh Circuit acknowledged that the Court in *Russell* had, in fact, noted that—

> [i]nclusion of the Secretary of Labor [as one of the four classes of plaintiffs] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes [of plaintiffs] is in the financial integrity of the plan.

Id. (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. at 142 n.9). Nevertheless, without reason or reference, the Seventh Circuit announced, arbitrarily, that "[a] review of Section 502, [29 U.S.C. § 1132] reveals that this passing inference to a 'representative capacity' and the 'financial intgerity of the plan' must not be read as broadly as the defendants would have us believe." *Id.*[3]

In summary, because the court below agreed with this unexplained result, and ignored that the Secretary sues under section 502(a)(2) of ERISA to recover losses to the plan under section 409(a) of ERISA only as a representative of the plan who acts in the interests of the plan, the decision below is contrary to *Massachusetts Mutual*

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[3] It is unclear whether the Seventh Circuit continues to adhere to this view. The now-Chief Judge of the Seventh Circuit later expressed his view, in a subsequent case, that claims brought by the Secretary under section 502(a)(2) of ERISA should be subject to the same doctrines of equitable estoppel as claims brought by the EEOC to obtain monetary relief for the individual victims of unlawful employment discrimination: "They are the same kind of suit as this; they are suits on behalf of private individuals in which any damages collected in the suit are paid over to the individuals rather than retained by the agency." *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078, 1100 (7th Cir. 1992) (Posner, J., concurring).

Life Insurance Co. v. Russell, 473 U.S. 134. For the same reason, the decision below is inconsistent with decisions of the First, Third, Fifth, Sixth and Ninth Circuits, as well as this Court's decision in *Schendel*, which recognize that the availability of two suits for a private monetary recovery, one by private individuals and another by the government, on behalf of an injured party, does not entitle the injured party to recovery both by the government and by private individuals. Rather, recovery by one bars, under the doctrine of *res judicata*, recovery by the other. Moreover, the decisions of this Court in *Hathorn*, *City of Richmond*, and *Sam Fox Publishing*, and of the Fifth Circuit in *East Baton Rouge Parish School Board*, are not to the contrary, and they provide the court below with no real support. Likewise, the Eleventh Circuit's decision in *Campbell*, and the Fifth Circuit's decision in *Cunningham*, merely endorse the uncontroverted fact that an independent claim by the Secretary for equitable relief is unaffected by a prior settlement of the injured plan's claim under section 502(a)(2) for monetary relief pursuant to section 409(a).

For all of these reasons, this Court should grant the petition for certiorari and decide on the merits that, as the dissent stated in *Fitzsimmons*, "in granting the Secretary enforcement powers in Section [502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2)] I believe Congress intended that the Secretary's interest be the same as that of the participants and beneficiaries who also had enforcement powers under [Section 502(a)(2), 29 U.S.C. § 1132 (a)(2)]." *Fitzsimmons*, 805 F.2d at 701 (Bauer, J., dissenting). And, for that reason, this Court should bar, under the doctrine of res judicata, the Secretary of Labor from subsequently recovering additional money damages on behalf of a plan under circumstances like these.

B. The Decision Below Threatens to Impede the Sound Administration of Justice by Undermining Private Parties' Incentives to Settle ERISA Claims.

Most civil ERISA claims are brought by private parties, not by the Secretary of Labor, and most of these claims settle short of trial. *See* Judicial Business of the United States Courts 1997 Report of the Director, Tables C-2, C-4. The decision of the court of appeals jeopardizes all such voluntary settlements. If the Secretary of Labor is not barred from bringing a second lawsuit to recover money damages on behalf of a settling plan, ERISA defendants will have the choice of (i) trying to join the Secretary in every private litigation, (ii) deferring any settlement until after the Secretary's statute of limitations runs, or (iii) simply reducing the settlement amount paid to the plan in order to account for the risk of later litigation brought by the Secretary. The first option is unpalatable for the Secretary and undesirable for the courts given the overwhelming number of ERISA cases. The latter two would hurt the private plans and participants whom the Secretary says she wants to help. Inevitably, the result is bad public policy, and one entirely foreign to our nation's legal system.

The law favors and encourages voluntary settlements. *Marek v. Chesny*, 473 U.S. 1, 10 (1985); *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910). The doctrines of res judicata and release help to accomplish that end by allowing the injured parties—here the plan through a court-certified class of all its participants—to sell complete peace in return for settlement dollars. In this respect, the doctrine of res judicata avoids "the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States*, 440 U.S. 147, 153-54 (1979). Applying the doctrines of res judicata and release in this circumstance is, in the words of this Court, "demanded by the very

object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement [here] is essential to the maintenance of social order . . . ." *Southern Pac. R.R. v. United States*, 168 U.S. 1, 49 (1897).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed May 15, 1998]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 97-6058

D.C. Docket No. CV-92-L-2858-NE
CV 91-L-1075-NE
CV 92-H-1544-NE

ALEXIS HERMAN,
Secretary of the United States Department of Labor,
Plaintiff-Appellant,
versus

SOUTH CAROLINA NATIONAL BANK;
WILLIAM A. FICKLING, JR., *et al.*,
Defendants-Appellees.

No. 97-6154

D.C. Docket No. CV-91-L-1075-NE
CV-92-H-1544-NE
CV-92-L-2858-NE

FRANCES J. KNOP; *et al.*,
Plaintiffs,
versus

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants,

SOUTH CAROLINA NATIONAL BANK,
Defendant-Third Party
Plaintiff-Appellee,

versus

ALEXIS HERMAN,
Secretary of the United States Department of Labor, *et al.*,
Third Party Defendants-
Appellants.

SOUTH CAROLINA NATIONAL BANK,
Plaintiff-Appellee,

WILLIAM A. FICKLING, JR., *et al.*,
Intervenor-Plaintiffs-Appellees,

versus

ALEXIS HERMAN,
Secretary of the United States Department of Labor, *et al.*,
Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Alabama

(May 15, 1998)

Before EDMONDSON and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

HULL, Circuit Judge:

These three consolidated cases concern an ERISA trustee's paying $80 million from the assets of an em-

ployee stock ownership plan to purchase allegedly worthless stock from a closely held corporation's owner, his relatives, and related entities. Claiming ERISA expressly prohibits this stock purchase, the Secretary of Labor appeals the district court's grant of summary judgment to the plan's trustee and the stock sellers.[1] After review, we reverse.

I. FACTUAL BACKGROUND

A. *The Stock Purchase*

In 1990, South Carolina National Bank ("SCNB") was the trustee of the Charter Medical Corporation Employee Stock Ownership Plan ("the Plan"). Trustee SCNB paid $80 million from Plan assets to William A. Fickling, Jr., his relatives, and related entities (the "Ficklings") to purchase their common stock in Charter Medical Corporation ("Charter"). Mr. Fickling was the President and Chairman of the Board of Directors at Charter, a closely held corporation. The Secretary contends that the Ficklings, as "parties in interest" under ERISA § 3(14), and SCNB, as the Plan trustee, violated ERISA § 406 when SCNB paid $80 million in Plan assets, or more than adequate consideration, to purchase the Ficklings' essentially worthless Charter stock.

To avoid conflicts of interest and self-dealing, ERISA prohibits stock transactions between a "party in interest" and a plan trustee. Although employee stock ownership plans ("ESOPs") invest in their employers' securities and generally are exempt from this prohibition, the exemption applies only if the transaction is for "adequate consideration."[2] Before addressing further the Secretary's action

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[1] Alexis Herman, the current Labor Secretary, has been substituted for Lynn Martin, the Labor Secretary in 1992 who initially brought this action.

[2] An employee stock ownership plan is an ERISA plan that invests primarily in the employer's stock. 29 U.S.C. § 1107(d)(6)(A). See *infra* notes 10 and 20 for discussion of this ERISA prohibition

against SCNB and the Ficklings, we review the two other lawsuits about this stock purchase that became consolidated with the Secretary's action.

B. *Private Litigants' Lawsuit Against Charter, the Ficklings, and SCNB*

In 1991, private litigants brought a class action against Charter, the Ficklings, SCNB, and others (the "*Knop* action").[3] The plaintiff class consisted of the Plan's beneficiaries, who alleged violations of ERISA, federal securities laws, and state law in both this $80 million stock purchase in 1990 and an earlier $375 million stock purchase in 1988. The Secretary was not a party to the *Knop* class action.

In March 1992, the Secretary was advised that the private litigants were settling with all defendants. The Secretary responded that she was conducting her own investigation of the stock transactions and was not bound by the private litigants' settlement. The Secretary received the formal settlement documents on April 6, 1992. By this time, the Secretary's expert had advised that Charter's significant debt of one and one-half billion dollars and the stock valuation errors during the 1990 purchase made the stock essentially worthless. On April 9, 1992, the Secretary again advised the *Knop* parties that the Secretary was

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and exemption. Charter's stock was not publicly traded and had no established market price. The Secretary contends the parties improperly evaluated the impact of over one and one-half billion dollars in corporate debt on Charter's solvency and the value of its stock.

3 The three consolidated lawsuits are: (a) the Secretary's complaint in *Martin v. South Carolina Nat'l Bank, et al.*, No. CV-92-2858-NE (N.D. Ala. July 24, 1992) (transferred from M.D. Ga.); (b) SCNB's third party complaint against the Secretary in *Knop, et al. v. Charter Med. Corp, et al.*, No. 91-L-1075-NE (N.D. Ala. May 10, 1991) (third party complaint filed Aug. 18, 1992); and (c) SCNB's complaint against the Secretary in *South Carolina Nat'l Bank v. Martin*, No. 92-H-1544-NE (N.D. Ala. July 7, 1992).

continuing her investigation, may bring suit, and was not bound by the *Knop* settlement. None of the parties sought to join the Secretary in the *Knop* action.

At the *Knop* fairness hearing on April 30, 1992, the district court approved the settlement. Charter made a $12.3 million financial contribution to the settlement, but the Ficklings and SCNB did not contribute any money to the settlement.[4] Nonetheless, the private litigants dismissed with prejudice all claims against the Ficklings and SCNB. *Knop* counsel informed the district court that the Secretary had advised the parties that the Department of Labor "had no desire to impede the proposed settlement but that their silence should not be taken as restricting whatever they might do in the future."

C. *SCNB's Lawsuit Against the Secretary*

Immediately after the *Knop* settlement, SCNB filed a new lawsuit against the Secretary on July 7, 1992, and simultaneously moved in *Knop* to file a third party complaint against the Secretary.[5] Each case sought a declaration that the Secretary was in privity with the private *Knop* plaintiffs and that the *Knop* settlement precluded the Secretary from additional relief in any future lawsuit.

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[4] SCNB stresses that Charter funded the *Knop* settlement as part of Charter's agreement to indemnify SCNB. The Ficklings also contend that they contributed financially because: (a) as preferred shareholders they surrendered certain priority rights as part of a bankruptcy plan of reorganization that allowed the Plan to obtain some value for the allegedly worthless stock; and (b) they consented to less favorable allocation of common stock. The Secretary disputes this contention and argues that there is no evidence that these conditions resulted in a benefit to the Plan or a sacrifice by the Ficklings and that there is some evidence to suggest that the reverse is true. In any event, given the magnitude of the Plan's losses, these contributions were negligible.

[5] *See supra* note 3.

D. *Secretary's Lawsuit Against the Ficklings and SCNB*

On July 24, 1992, the Secretary filed her own action against the Ficklings and SCNB.[6] The Secretary did not sue Charter or any parties contributing monetarily to the *Knop* settlement, but sued only the Ficklings and SCNB, who paid nothing. The Secretary sought to recover from the Ficklings and SCNB $80 million (offset by sums already recovered), ERISA's statutory civil penalties, equitable relief for recission and disgorgement of profits, and injunctive relief.

E. *Three Lawsuits Consolidated*

In late 1992, the three lawsuits were consolidated because each involved whether the Secretary was bound by the private *Knop* settlement. In early 1993, the Ficklings and SCNB moved for summary judgment. In a June 25, 1993 order, the district court granted summary judgment for the Ficklings in a single sentence without analysis, citing only *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991). However, as discussed *infra*, *Useden* supports, not defeats, the Secretary's claim against the Ficklings.

In contrast to the Ficklings' motion, the district court held in abeyance SCNB's motion for partial summary judgment and permitted discovery only on the narrow issue of whether SCNB had breached its fiduciary obligations. The Secretary was prohibited from conducting discovery on SCNB's claims of laches, res judicata, and release and other issues. In 1996, the district court granted SCNB's 1993 motion for partial summary judgment, finding that laches, res judicata, and release barred the Secretary's claims. The district court did not distinguish between the Secretary's legal claims for money damages, equitable claims for disgorgement of profits, or right to assess ERISA's civil penalties, but treated all as claims for monetary relief.

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[6] *See supra* note 3.

Subsequently, the Secretary and SCNB settled her claims for injunctive relief, making the case final.[7] The Secretary then appealed the district court's grant of summary judgment for the Ficklings and SCNB on the Secretary's remaining legal and equitable claims and right to assess civil penalties.[8]

II. ERISA § 406 PROHIBITS THIS STOCK TRANSACTION BETWEEN PLAN AND "PARTIES IN INTEREST"

We first examine the ERISA violation in issue. The Secretary alleges that the Ficklings are "parties in interest," as defined under ERISA § 3(14), and that they violated ERISA § 406 by engaging in a prohibited stock transaction with SCNB.

As alleged by the Secretary, ERISA § 406 does prohibit stock transactions between an ERISA plan and a "party in interest", as follows:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> > (A) sale or exchange, or leasing, of any property *between the plan and a party in interest*;
> >
> > . . .
> >
> > (D) *transfer to*, or use by or for the benefit of, *a party in interest, of any assets of the plan*;
> >
> > . . .

29 U.S.C. § 1106(a)(1)(A), (D) (ERISA § 406(a)(1)(A),(D)) (emphasis supplied).

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[7] SCNB agreed not to serve as a trustee for any ERISA plan for three years or ever again for Charter's Plan.

[8] We review a district court's grant of summary judgment *de novo*. *Useden v. Acker*, 947 F.2d 1563, 1572 (11th Cir. 1991).

Also, the Ficklings may be considered "parties in interest" under a number of § 3(14)'s definitions.[9] ERISA § 3(14) defines a "party in interest" to include fiduciaries, plan employees, service providers, employers whose employees are covered by ERISA plans, employee organizations whose members are covered by a plan, and owners of 50% or more of stock in these employers and employee organizations, or a relative of such an owner. 29 U.S.C. § 1002(14) (ERISA § 3(14)). A "party in interest" also includes employees, officers, and directors, as well as shareholders, partners, and joint venturers owning ten percent or more of entities that are themselves "parties in interest." *Id.*

ERISA prohibits stock transactions between a plan and a "party in interest" because of the obvious conflicts of interest and the high potential for abuse and injury to the plan. *See* 29 U.S.C. § 1106(a)(1)(A),(D) (ERISA § 406(a)(1)(A),(D)). The Supreme Court noted that in enacting § 406(a) barring transactions between a "party in interest" and an ERISA plan, "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan." *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). It is clear that a stock transaction for more than adequate consideration betwen SCNB, as Plan trustee, and the Ficklings, as "parties in interest," violates § 406.[10] The parties mainly

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9 The district court's order, dated December 3, 1992, transferring the Secretary's action from Georgia to Alabama, made a finding that "Mr. Fickling was a 'party in interest' with respect to the ESOP under ERISA, as were his relatives and affiliated business entities." *Martin v. South Carolina Bank, et al.*, No. 92-298-1-MAC (DF), at 2 (M.D. Ga. Dec. 3, 1993). Subsequently, the district court in Alabama granted summary judgment to the Ficklings on a different basis, without completed discovery on, and without reaching, the "party in interest" issue. Thus, our analysis assumes *arguendo* that the Ficklings are "parties in interest" as the Secretary alleges. *See also infra* note 26.

10 Since an ESOP invests mainly in an employer's securities, ERISA § 408(e) exempts from § 406's prohibited transactions an

dispute whether the Secretary can sue the Ficklings as "parties in interest" for participating in that stock transaction prohibited by § 406 or only the fiduciary SCNB.

III. SECRETARY MAY SUE FICKLINGS FOR EQUITABLE RELIEF UNDER § 502(a)(5) FOR ACTS VIOLATING § 406

A. *Useden Distinguishes Suits Against Non-fiduciaries Under §§ 502(a)(2) and 409 From Suits Against Non-fiduciary "Parties in Interest" under §§ 502(a)(5) and 406*

The district court granted summary judgment to the Ficklings, citing only this court's decision in *Useden v. Acker*, 947 F.2d 1563 (11th Cir. 1991). *Useden* concerns breach of fiduciary duties under *§ 409* and holds that *non-fiduciaries* cannot be sued under § 502(a)(2) for *breaching fiduciary duties* under *§ 409*. However, *Useden* supports, not defeats, the Secretary's claim against the Ficklings as "parties in interest" under *§ 406* because *Useden* goes further and indicates that *§ 502(a)(5)* authorizes suits for equitable relief against *non-fiduciary "parties in interest"* whose *acts violate § 406* without restricting the type of party who may be sued. *See Useden*, 947 F.2d at 1581. Comparisons of § 409 versus § 406 and § 502(a)(2) versus § 502(a)(5), plus review of *Usedon*, readily reveal why the Secretary can sue the Ficklings here.

We begin with ERISA § 502(a), where Congress outlined who may bring civil actions and for what relief.

ESOP's acquisition of employer stock if (1) the acquisition is for "adequate consideration," and (2) no commission is charged with respect to the acquisition. 29 U.S.C. § 1108(e) (ERISA § 408(e)). The Secretary alleges that the § 408(e) exemption does not apply to the Plan's stock purchase because the Plan paid more than adequate consideration for the stock. The issue of whether the consideration was adequate was never resolved in the district court and is not before this court on appeal. Instead, the parties and the court have assumed *arguendo* for this appeal that SCNB paid more than adequate consideration for the allegedly worthless stock. *See infra* note 20.

A comparison of § 502(a)(2) with § 502(a)(5) follows:

> A civil action may be brought—
>
> . . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary *for appropriate relief under section [409]*; [11]
>
> . . .
>
> (5) . . . by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) *to obtain other appropriate equitable relief* (i) *to redress such violation* or (ii) to enforce any provision of this subchapter; . . .

29 U.S.C. § 1132(a)(2), (5) (ERISA § 502(a)(2), (5)) (emphasis supplied). Section 502(a)(5) authorizes the Secretary to obtain "appropriate equitable relief" to redress ERISA violations. While § 502(a)(5) limits the Secretary to only "equitable relief," § 502(a)(5) does not restrict "the types of parties who can be so sued." *Useden* 947 F.2d at 1581. Section 502(a)(5) does not restrict equitable relief to being against only fiduciaries.

In contrast, the Secretary may sue under § 502(a)(2), but only "for appropriate relief under section [409]." Section 502(a)(2), in effect, incorporates § 409, and thereby limits relief to that available under § 409. We thus turn to § 409, which provides that only *fiduciaries* "shall be personally liable" for breach of *fiduciary* duties, as follows:

> *Any person who is a fiduciary* with respect to a plan who breaches any of the responsibilities, obligations, or duties *imposed upon fiduciaries* by this subchapter *shall be personally liable* to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of *such fiduciary* which have been made through use of

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[11] 29 U.S.C. § 502(a)(2) refers to appropriate relief under § 1109 of Title 29, the codified version of § 409 of ERISA.

> assets of the plan *by the fiduciary*, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of *such fiduciary*.

28 U.S.C. § 1109(a) (ERISA § 409(a)) (emphasis supplied).

The *Useden* court read the terms of § 409 and § 502(a)(2), referencing § 409, as limiting relief to *fiduciaries* for breaches of *fiduciary* duties. *Useden* held that the defendants bank and attorneys, who had advised the former plan fiduciary trustee, were not liable for *breaches of fiduciary* duties under §§ 409 and 502(a)(2) because the bank and attorneys had not acquired *fiduciary status* in the financial transactions in issue. *Useden*, 947 F.2d at 1572-79.

Importantly for this case, *Useden* went further and pointed out significant differences between § 409 and § 406 and between § 502(a)(2) and § 502(a)(5). *Useden* first noted the absence of textual treatment of non-fiduciaries in § 409 and § 409's express language limiting personal liability to fiduciaries. *Useden* then contrasted that with § 3(14)(B)'s broad definition of "parties in interest with whom plans are prohibited to enter into certain transactions under section 406(a)" and § 502(a)(5)'s authorization of suit for equitable relief for "any act or practice" violating ERISA "without restricting the type of parties who may be sued." *Id.* at 1581. *Useden* summarized these important differences in these ERISA statutes, as follows:

> In the present case, appellant would have us ignore the obvious care with which ERISA's remedial provisions are formulated, instead requiring us to supplement the statute with a substantive right against a party that Congress readily could have chosen to reach. Congress clearly contemplated the involve-

> ment of non-fiduciary parties with employee benefit plans when it drafted provisions of ERISA. *For example, ERISA sections 502(a)(3) and 502(a)(5) authorize suits to enjoin or obtain other equitable relief for "any act or practice" violating either the statute or the terms of a plan, without restricting the types of parties who may be so sued. ERISA section 3(14)(B), moreover, broadly defines the "parties in interest" with whom plans are prohibited to enter into certain transactions under section 406(a).* Significantly, however, Congress expressly limited the scope of sections 502(a)(3) and 502(a)(5) to equitable remedies, and likewise limited section 409(a) to provide a right of action only against fiduciaries. It is telling that, *despite textual treatment of non-fiduciaries in various other parts of the ERISA scheme,* provisions [§§ 409 and 502(a)(2)] relevant to appellant's theory contain no textual support for a claim for monetary damages against non-fiduciaries. We cannot infer that Congress's silence is accidental in an area where Congress has already said so much out loud.

Id. at 1581-82 (citations omitted) (emphasis supplied). Construing first §§ 409 and 502(a)(2), *Useden* holds only that *non-fiduciaries* cannot be sued for *breach of fiduciary duties* because § 409 contains no references to non-fiduciaries and because Congress expressly limited liability in §§ 409 and 502(a)(2) to fiduciaries.

In reaching this holding, *Useden* then contrasts §§ 409 and 502(a)(2) with §§ 406 and 502(a)(5) and answers in dicta the very different question posed here regarding who can be sued for equitable relief under § 502(a)(5) for engaging in stock transactions prohibited by § 406. In short, who can the Secretary sue for acts that violate ERISA § 406? *Useden* directly points to a "party in interest" who participates in a prohibited transaction in

violation of § 406 as an example of a non-fiduciary against whom relief may be sought under § 502(a)(5). *Id.* at 1581. This is precisely the Secretary's claim against the Ficklings in this case.[12] In addition to pointing out ERISA's textual treatment of "parties in interest" in § 406, *Useden* goes further and concludes these "parties in interest" can be sued for equitable relief under § 502 (a)(5) because § 502(a)(5) does not restrict the type of parties who may be sued.

B. *Other Circuits Hold Non-fiduciary "Parties in Interest" May Be Sued for Violating § 406*

Similar to *Useden's* dicta, other circuit courts have held uniformly that an ERISA-defined "party in interest" like the Ficklings, may be sued for equitable relief under either § 502(a)(5) or § 502(a)(3) when that "party in interest" violates ERISA by engaging in transactions with fiduciaries prohibited by § 406. *See Reich v. Stangl*, 73 F.3d 1027 (10th Cir.), *cert. denied*, 117 S. Ct. 48 (1996) (§ 502(a)(5)); *Landwehr v. Dupree*, 72 F.3d 726 (9th Cir. 1995) (§ 502(a)(3)); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995) (§ 502(a)(5)); *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) (§ 502(a)(3)); *see also Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994) (§ 502(a)(5)). Where a fiduciary and a "party in interest" directly engage in a transaction that violates § 406, no circuit has limited relief under § 502(a)(5) to only the fiduciary.

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[12] In holding that a non-fiduciary cannot be sued for breach of fiduciary duties in *Reich v. Rowe*, 20 F.3d 25 (1st Cir. 1994), the First Circuit also compared § 409 against § 406 and contrasted actions against non-fiduciaries for participation in a fiduciary's breach with actions against non-fiduciary "parties in interest" for participation in prohibited transactions. The First Circuit concluded that "[a]lthough fiduciary breaches also violate ERISA, non-fiduciaries cannot, by definition, engage in the act or practice of breaching a fiduciary duty. Non-fiduciaries can, however, engage in the act or practice of transacting with an ERISA plan." *Id.* at 31 n.7.

Instead, reading §§ 502(a)(5) and 406 together, these circuits have held that the ERISA "party in interest" who benefitted from the impermissible transaction with the fiduciary is liable under ERISA for equitable relief and is required to disgorge ill-gotten assets from the ERISA plan.

We agree with the panel's dicta in *Useden* and other circuits addressing this same issue, and now hold that under §§ 502(a)(5) and 406 the Secretary may seek equitable relief from "parties in interest" to transactions prohibited by § 406. As *Useden* points out, § 502(a)(5) is aimed at such "act[s] or practice[s] violating [ERISA]" without restricting the types of parties who may be so sued." *Id.* at 1581.

C. *Supreme Court's Mertens*

The Ficklings emphasize that §406 begins, like § 409, with the term "fiduciary" and that § 406 provides that a fiduciary shall not cause the plan to enter into prohibited transactions with "parties in interest." The Ficklings argue that § 406 imposes a duty on only fiduciaries not to cause a plan to enter into transactions with "parties in interest," but does not prohibit a "party in interest" from entering into that same transaction with a fiduciary. This argument, however, ignores key differences in the statutory language of § 406 and § 409, plus the Supreme Court's recent decision in *Mertens* recognizing § 406's prohibition on "parties in interest" engaging in transactions with an ERISA plan.

First, as to the statutory language, § 409 provides that a fiduciary "shall be personally liable" for breaches of fiduciary duties. In contrast, § 406 does not address, much less limit, who shall be personally liable; instead § 406 prescribes the type of transactions that ERISA prohibits. While § 406 does instruct fiduciaries—typically the plan trustee—not to cause the plan to enter into transactions with "parties in interest," § 406 also serves to

prohibit transactions between a fiduciary and a "party in interest." Even if § 406 imposes an affirmative duty on fiduciaries not to cause the plan to enter into certain prohibited transactions, this in no sense lessens the fact that a transaction between a plan and a "party in interest" remains a prohibited transaction under § 406. *See Useden*, 947 F.2d at 1581-82; *Reich v. Stangl*, 73 F.3d 1207, 1030-31 (10th Cir. 1996); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994); *Reich v. Compton*, 57 F.3d 270, 285-86 (3d Cir. 1995); *Nieto v. Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988).

Second, § 502(a)(2) limits the Secretary to only "appropriate relief under section [409]," and then § 409 limits personal liability to fiduciaries. In contrast, § 502(a)(5), as *Useden* recognizes, permits the Secretary to obtain equitable relief to address any act or practice that violates § 406 without restricting who may be sued. *See Useden*, 947 F.2d at 1581. As "parties in interest" to a prohibited transaction, the Ficklings engaged in an act or practice that violates ERISA. Section 502(a)(5) thus expressly authorizes the Secretary to obtain appropriate equitable relief from the Ficklings to redress that ERISA violation. While the Ficklings may not be subjected to legal claims for compensatory damages for joining in a fiduciary's breach under § 409, they may be liable as "parties in interest" for equitable disgorgement of their profits received from engaging in a prohibited transaction in violation of § 406.

More importantly, a recent Supreme Court decision supports *Useden*'s analysis of § 406. In *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260-61 (1993), the Supreme Court acknowledged in dicta that non-fiduciaries may be sued and required under § 502(a)(5) to disgorge ill-gotten plan assets or profits obtained through participation in transactions prohibited by § 406. The Supreme Court explained that "the 'equitable relief' awardable un-

der § 502(a)(5) includes restitution of ill-gotton plan assets or profits. . . ." *Mertens*, 508 U.S. at 260. The Supreme Court held that non-fiduciaries may not be liable for the legal remedy of compensatory damages for breach of fiduciary duties because ERISA contains no provision requiring non-fiduciaries to avoid participation in a fiduciary's breach of fiduciary duty.

However, the Supreme Court also contrasted the lack of any ERISA provision regarding a non-fiduciary's participation in a fiduciary's breach with other ERISA provisions, such as § 406 "that can be read as imposing obligations upon nonfiduciaries. . . ." *Id.* at 253-54. As an example of a provision that imposes such an obligation, the Supreme Court cited § 406(a)'s prohibition on "parties in interest" offering services or engaging in other transactions with the plan. *Id.* at 254 n.4. The Supreme Court further stated that professional service providers "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties or excise taxes . . . ." *Id* at 262 (citations omitted).

While *Mertens* involved service providers, the concept that "parties in interest" can be sued for disgorgement of profits for participating in a transaction prohibited by § 406 is no less applicable to other non-fiduciary "parties in interest," such as the Ficklings.[13] *See* 29 U.S.C. § 1002(14)(B) (ERISA § 3(14)(B)) (including service providers within the definition of "parties in interest"). Even though disgorgement of profits may produce money, *Mertens* makes it clear that disgorgement of profits is a distinctly equitable remedy different from the legal remedy

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[13] The Third and Tenth Circuits also found that the Supreme Court in *Mertens* implied that a non-fiduciary "party in interest" may be liable under § 502(a)(5) for participating in transactions prohibited by § 406. *Reich v. Compton*, 57 F.3d 270, 285 (3rd Cir. 1995); *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996).

of compensatory damages for breach of fiduciary duty. *See Mertens* 508 U.S. at 260. The Court's definition of appropriate equitable relief under § 502(a)(5) clearly encompasses the fruits of a prohibited transaction from "parties in interest" like the Ficklings.[14]

In sum, under § 502(a)(5), the Secretary may sue the Ficklings as "parties in interest" for equitable relief for engaging in a prohibited transaction with SCNB in violation of § 406. Therefore, the district court erred in granting summary judgment to the Ficklings.

IV. PRIVATE LITIGANTS' SETTLEMENT DOES NOT BAR SECRETARY'S ACTION

The Ficklings and SCNB next contend that the *Knop* private settlement bars the Secretary's action against them. This issue requires us to examine the Secretary's special statutory role in seeking relief and assessing civil penalties for ERISA violations.

A. *Secretary's Statutory Role*

In § 502(a), Congress granted the Secretary an independent and unqualified right to sue and seek redress for ERISA violations because ERISA plans significantly affect the "national public interest." ERISA itself contains a declaration of public purpose that recognizes that the economic impact of private benefit plans affects the "national public interest."[15] *See* 29 U.S.C. § 1001(a)

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[14] In *Lockheed Corp. v. Spink*, 517 U.S. 882, 116 S. Ct. 1783 (1996), the Supreme Court acknowledged that *Mertens*'s statements about § 406 were dicta, but declined to retreat from that dicta and stated again, albeit in dicta, that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA." *Id.* at 1789 n.3.

[15] ERISA's statement of purpose provides "that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is [sic] increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; *that they are*

(ERISA § 2(a)). Private ERISA litigants seek to redress individual grievances. However, in suing for ERISA violations, the Secretary seeks not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.

One circuit court succintly summarized the Secretary's national public interest in bringing ERISA actions as ensuring "the financial stability of billions of dollars of assets which in turn have a monumental effect on not only the Treasury of the United States, but on the national economy and commerce as well." *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 692 (7th Cir. 1986) (en banc). In addition to recovering plan losses, the Secretary "has an even stronger and paramount obligation to protect the very integrity, heart and lifeline of the program itself." *Id.* at 692-93.

ERISA's legislative history also emphasizes the Secretary's national public interest in deterrence, including the need for the Labor Department to have "broad authority to monitor employee benefit plans and deter violations of the law," and to "restructure its enforcement efforts to emphasize deterrence." H.Conf.Rep. No. 101-386, at 431-32 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3018, 3035.[16]

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affected with a national public interest; . . . ." 29 U.S.C. § 1001(a) (ERISA § 2(a)) (emphasis supplied).

[16] In 1989, Congress expanded § 502 to confer additional enforcement powers upon the Secretary, including assessment of civil penalties against plan administrators, § 502(c)(2), "parties in interest," § 502(i), fiduciaries, § 502(*l*)(1)(A), (m), and, in some instances, against "any person," § 502(c)(4), (c)(5), (*l*)(1)(B). Omnibus Budget Reconciliation Act of 1989, Pub. L. 101-239, 103 Stat. 2123. These civil penalties go directly to the United States Treasury. While the Secretary must assess civil penalties, none of the contested issues about these civil penalties is presently before the court on appeal.

The congressional Conference Committee concluded that the Secretary must have and use enforcement powers and civil penalties to make ERISA meaningful, as follows:

> [I]t has become apparent that the Department must use its enforcement powers more vigorously to make the protection of ERISA meaningful. The conferees believe strengthened civil penalties will better enable the Department to protect participants and beneficiaries. The conferees further believe that the need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of actions affecting employee benefit plans. It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.

Id. at 3035-36. Against this statutory background, we examine why the private litigants' settlement in *Knop* does not bar the Secretary' s action here.

B. *Res Judicata*

The district court incorrectly held that the private litigants' settlement barred the Secretary's claims under the doctrine of res judicata or claim preclusion.[17] This doctrine does not apply unless "the parties to both actions, or those in privity with them, are identical." *Richardson v. Alabama State Bd. of Educ.*, 935 F.2d 1240, 1244 (11th Cir. 1991); *see also Hart v. Yamaha-Parts Distributs., Inc.*, 787 F.2d 1468, 1471-72 (11th Cir. 1986). This

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[17] Application of res judicata presents questions of law reviewed *de novo*. *Richardson v. Miller*, 101 F.3d 665, 667-68 (11th Cir. 1996); *Riddle v. Cero Wire & Cable Group, Inc.*, 902 F.2d 918, 921-22 (11th Cir. 1990). For the same reasons that res judicata principles do not apply in this case, the *Knop* plaintiffs could not release the Secretary's claims against the defendants.

circuit has held that " '[a] nonparty to a prior decision cannot be bound by it unless he had sufficient identity of interest with a party that his interests are deemed to have been litigated.' " *In re Birmingham Reverse Discrimination Employment Litigation*, 833 F.2d 1492, 1498 (11th Cir. 1987) *aff'd sub nom. Martin v. Wilks*, 490 U.S. 755 (1989) (quoting *Wilson v. Attaway*, 757 F.2d 1227, 1237 (11th Cir. 1985)). The doctrine does not apply here because the Secretary was not a party to the *Knop* settlement and has national public interests separate and distinct from those of the *Knop* private litigants.

Every circuit addressing the issue has held that the Secretary is not bound by prior private litigation when the Secretary files an independent action to address ERISA violations. *See, e.g., Beck v. Levering*, 947 F.2d 639, 642 (2d Cir. 1991), *cert. denied sub nom., Levy v. Martin*, 504 U.S. 909 (1992); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 690-94 (7th Cir. 1986); *Donovan v. Cunningham*, 716 F.2d 1455, 1462-63 (5th Cir. 1983); *see also Brock v. Gilliken*, 677 F. Supp. 398, 402 (E.D.N.C. 1987). Each court recognized that the Secretary's national public interests in bringing an ERISA enforcement action are wholly distinct and separate from those of private litigants who seek to redress individual grievances or recoup plan losses for their personal benefit as plan beneficiaries. *See, e.g., Fitzsimmons*, 805 F.2d at 693-94. The courts note that under ERISA's statutory framework private plaintiffs do not adequately represent, and are not charged with representing, the broader national public interests represented by the Secretary.[18]

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[18] The district court cited footnote 9 in *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985) for the proposition that the Secretary sues only in a representative capacity. However, *Russell*'s footnote 9 addressed only actions under § 502(a)(2) for breach of fiduciary duties under § 409. *Russell* did not involve res judicata or a Secretary's claim under § 502(a)(5) for equitable relief against "parties in interest" participatng in a prohibited transacton in violation of § 406. *Russell* also points out that § 502

A previous ERISA decision from this circuit foreshadows our similar conclusion that the *Knop* private settlement does not bar the Secretary's action here. In *Campbell v. Hall-Mark Electronics Corp.*, 808 F.2d 775 (11th Cir. 1987), this court affirmed a denial of the Secretary's motion to intervene to oppose a plan participants' class action settlement. This court noted that the Secretary's interests were not prejudiced significantly by the settlement because "the Secretary certainly may continue to litigate his own case in pursuit of whatever broader public policy interests he deems important." *Id.* at 779. *Campbell* recognized that the Secretary has an independent right to sue. A corollary to *Campbell* is that a private litigation settlement does not preclude the Secretary's separate action.

Similar to this case, the Secretary's main objection to the private settlement in the Seventh Circuit's *Fitzsimmons* decision was that the private "recovery was wholly inadequate in light of the number and dollar amount of the claims against the former trustees and also that the settlement agreement failed to allow recovery from the personal assets of the former trustees." *Fitzsimmons*, 805 F.2d at 686. After extensive review of ERISA's statutory framework and purposes, the Seventh Circuit en banc held directly that the private settlement did not bar the Secretary's independent right to sue. *Id.* at 694.[19]

(a)(2) "authorizes suits by four classes of party-plaintiffs: the Secretary of Labor, participants, beneficiaries, and fiduciaries." 473 U.S. at 142 n.9. In contrast, ERISA separates the Secretary's right to sue for ERISA violations in § 502(a)(5) from the participant's, beneficiary's, and fiduciary's right to sue for ERISA violations in § 502(a)(3).

[19] Appellees quote selective statements from *Fitzsimmons* and argue that a private setlement limits the Secretary to only injunctive relief, even if the Secretary can sue independently. *Fitzsimmons*'s discussion about the separate interest of the Secretary in obtaining injunctive relief is only one of the many examples of the Secretary's separate interests discussed in *Fitzsimmons*. The Seventh Circuit also discusses the Secretary's separate legal interests

These ERISA cases are consistent with the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests. *See Hathorn v. Lovorn*, 457 U.S. 255, 268 n.23 (1982); *City of Richmond v. United States*, 422 U.S. 358, 373 n.6 (1975); *Sam Fox Publ'g. Co., Inc. v. United States*, 366 U.S. 683, 689-90 (1961); *United States v. East Baton Rouge Parish Sch. Bd.*, 594 F.2d 56, 58 (5th Cir. 1979). In *East Baton Rouge Parish School Board*, this court also recognized this general principle that a private plaintiff's prior litigation does not bar the government's action, stating:

> [T]he district court's conclusion [that the private plaintiffs and the United States were identical] is directly contrary to the general principle of law that the United States will not be barred from independent litigation by the failure of a private plaintiff. This principle is based primarily upon the recognition that the United States has an interest in enforcing federal law that is independent of any claims of private citizens. In the present context the Supreme Court has characterized this as "the highest public interest in the due observance of all constitutional guarantees." Also, any contrary rule would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention.

East Baton Rouge Parish Sch. Bd., 594 F.2d at 58 (quoting in part *United States v. Raines*, 362 U.S. 17 (1960) (citations omitted)).

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in protecting a plan's financial stability in obtaining disgorgement of illegal profits, in preventing unjust enrichment, in restoring plan assets, in protecting beneficiaries' incomes, and in deterring future ERISA violations, all of which implicate monetary recoveries. (The civil penalties, enacted in 1989, were not in effect when *Fitzsimmons* was decided.)

Subsequently, the Fifth Circuit directly applied this same principle to an ERISA case similar to this one, *Donovan v. Cunningham,* 716 F.2d 1455, 1462-63 (5th Cir. 1983). In *Donovan,* an ESOP trustee allegedly had paid more than adequate consideration for the stock of the company's president.[20] The Fifth Circuit concluded that the Secretary's interest was different from private plaintiffs' interests and, thus, the Secretary was not precluded from bringing an independent action for ERISA violations. *Id.*[21]

The ERISA enforcement scheme, carefully constructed by Congress, is undermined if private litigants can sue ERISA violators first, reach a settlement, and bar the Secretary's action. The terms of the *Knop* private settlement illustrate why this result is not what Congress intended, or provided, in ERISA. The *Knop* settlement recovered from Charter only a small fraction of the Plan's $80 million in assets lost in the stock purchase. The private plaintiffs released and dismissed with prejudice both SCNB and the Ficklings despite having alleged serious ERISA violations against them and even though they

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[20] The Fifth Circuit held that the "adequate consideration" exemption in ERISA § 408 was not applicable and thus the stock transaction was prohibited by ERISA § 406. *Donovan* discusses at length the mechanics of ESOPs, the duties of ESOP fiduciaries under ERISA, and the nature of the inadequate consideration exemption in ERISA § 408. *See generally Donovan v. Cunningham,* 716 F.2d 1455 (5th Cir. 1983); *see also supra* note 10.

[21] Appellees contend *Donovan* supports their defense that the Secretary's independent action is limited to injunctive relief. We disagree. *Donovan's* discussion of injunctive relief concerned only whether the Secretary's action was moot because the private parties dissolved the ESOP as part of their settlement. In fact, the *Donovan* court noted that whether the Secretary's equitable claim for disgorgement was barred was not addressed by the district court and remanded that issue because "the parties have not adequately addressed the issues raised by these remedial arguments in the special context of ERISA." *Donovan,* 716 F.2d at 1462-63 & n.10.

made a negligible contribution to the settlement. Since only the Secretary can assess civil penalties, none were paid.[22]

While private plaintiffs understandably may be willing to compromise claims to gain prompt and definitive relief, the *Knop* settlement does not further the broader national public interests represented by the Secretary and reflected in Congress's delegation of ERISA enforcement powers to the Secretary. The national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery and thereby immunize plan trustees and "parties in interest" from ERISA violations. Furthermore, the public treasury is ill-served by denying the Secretary

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22 Defendants rely heavily on EEOC cases from other circuits that preclude the EEOC from recovering monetary relief for private individuals who already have settled in their own name. However, this circuit has recognized that the interests of the EEOC and private litigants at times "are not necessarily compatible," and "are not always identical." *Riddle v. Cerro Wire & Cable Group, Inc.*, 902 F.2d 918, 922-23 (11th Cir. 1990) (holding private litigant's Title VII claims not barred by EEOC's settled suit). *Riddle* concluded that although the EEOC is able to recover damages for back pay and benefits, the EEOC is primarily interested in preventing employment discrimination in the workplace; whereas, the aggrieved individual is more interested in "specific personal relief" in her private action. *Id.* at 922-23.

Defendants' reliance on EEOC cases also ignores the different statutory enforcement schemes of Title VII and the ADEA, which reflect Congress's intent to limit multiple suits. Title VII and the ADEA require a private plaintiff to file a discrimination charge with the EEOC before suing. 42 U.S.C. § 2000e-5(b), (e), and (f); 29 U.S.C. § 626(d). The ADEA also terminates a private plaintiff's right of action under the ADEA upon "commencement of an action by the Equal Employment Opportunity Commission to enforce the right of such employee under this chapter." 29 U.S.C. § 626(c)(1). In contrast, ERISA gives plan beneficiaries and the Secretary independent rights of action, does not require private plaintiffs to file charges with the Secretary before suing, and nowhere forecloses private actions after the Secretary files suit, or, the Secretary's suit after a private action commences.

the opportunity to assess civil penalties, expressly authorized by Congress to deter ERISA violations, as well as the occasion to ensure that the Plan receives full value for the millions of dollars in tax subsidies.

C. *ERISA § 502(h)*

The district court emphasized that ERISA § 502(h) requires private litigants to serve their complaint on the Secretary and gives the Secretary discretion to intervene. *See* 29 U.S.C. § 1132(h) (ERISA § 502(h)). The purpose of § 502(h) is to provide the Secretary notice of ongoing lawsuits. *See Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 691 (7th Cir. 1986) (en banc). In § 502(h) Congress gave the Secretary discretion to intervene, but chose not to require the Secretary to do so. As the Seventh Circuit noted, Congress "never mandated that the Secretary must intervene in each and every piece of litigation or forever be barred by the doctrine of res judicata." *Id.* As this court previously recognized, "[t]he courts should not jam judicially created doctrines such as res judicata into the gears of Congress' carefully crafted statutory machinery." *United States v. Barnette*, 10 F.3d 1553, 1561 (11th Cir. 1994).

Given the volume of cases the Department of Labor monitors, courts recognize that it is unreasonable and unwise to require the Secretary to intervene in every ERISA action or be precluded.[23] *See, e.g., Donovan v. Cunningham*, 716 F.2d 1455, 1462 (5th Cir. 1983) (stating that to bar Secretary's ERISA action as a result of pri-

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[23] In 1989, the congressional Conference Committee, reporting on the civil penalties in § 502(*l*) noted that the Department of Labor was responsible for approximately 5.5 million employee benefit plans holding $2 trillion in assets and that the Department's resources had not kept pace with the growing importance of the benefits to the public, the expanding amount of plan assets, or the increasing number of plans. H.R. Conf. Rep. No. 101-386, at 432 (1989), *reprinted in* 1989 U.S.C.C.A.N. 3029, 3035.

vate settlement "would impose an onerous and extensive burden upon the United States to monitor private litigation in order to ensure that possible mishandling of a claim by a private plaintiff could be corrected by intervention"). Likewise, we decline to mandate judicially that the Secretary must intervene or be barred because this would frustrate Congress's express decision to leave intervention to the Secretary's "discretion" in § 502(h) and would permit defendants violating ERISA to settle quickly with private plaintiffs and defeat the Secretary's enforcement powers granted by Congress.

F. *Laches*

The district court also incorrectly held that the doctine of laches precluded the Secretary's action against SCNB. "It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights." *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *United States v. Fernon*, 640 F.2d 609, 613 (5th Cir. Unit B Mar. 1981) (following *Summerlin*). This principle protects public rights vested in the government for the benefit of all from "the inadvertence of the agents upon which the government must necessarily rely." *United States v. Alvarado*, 5 F.3d 1425, 1427 (11th Cir. 1992); *see also United States v. Arrow Transp. Co.*, 658 F.2d 392, 394-95 (5th Cir. Unit B Oct. 1981) ("Although the fact situation describes a textbook case of laches, that defense cannot be asserted against the United States in its sovereign capacity to enforce a public right or to protect the public interest.").

To overcome this accepted rule, the district court relied upon Title VII cases. However, this circuit permits laches to bar an EEOC suit only because Title VII contains no statute of limitations. *See e.g., EEOC v. Dresser Indus., Inc.*, 668 F.2d 1199, 1201-02 (11th Cir. 1982) ("Laches is an equitable doctrine designed to prevent unfairness to

a defendant due to a plaintiff's delay in filing suit *in the absence of an appropriate statute of limitations.*") (emphasis supplied); *see also EEOC v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988); *Boone v. Mechanical Specialties Co.*, 609 F.2d 956, 959 (9th Cir. 1979); *EEOC v. Liberty Loan Corp.*, 584 F.2d 853, 856 (8th Cir. 1978). In contrast, ERISA contains a detailed statute of limitations for actions regarding certain fiduciary breaches and ERISA violations. The Secretary filed her lawsuit within the time permitted by ERISA.[24] The rationale in EEOC suits for departing from the accepted rule is not present here.[25] Given the Supreme Court's mandate that the judiciary not tamper with ERISA's enforcement scheme, *Massachusetts Mut. Life Ins. v. Russell*, 473 U.S. 134, 147 (1985), and our circuit's recognition of the importance of ERISA's time lines, *Brock v. Nellis*, 809 F.2d 783, 784 (11th Cir. 1987), the district court erred in extending the laches exception in Title VII to ERISA actions. *See Reich v. Valley Nat'l Bank of Arizona*, 837 F. Supp. 1289, 1308-09 (S.D.N.Y. 1993); *First Bank Sys., Inc. v. Martin*, 783 F. Supp. 425, 426-27 (D. Minn. 1991); *Donovan v. Schmouter*, 592 F. Supp. 1361, 1403 (D. Nev. 1984).

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[24] Congress has specified the limitations period for a variety of circumstances, providing that an ERISA plaintiff must sue within six years from the last breach or violation, within three years from the date of actual knowledge of a breach or violation, or, in the case of fraud or concealment, within six years from the date of discovery of the breach or violation. 29 U.S.C. § 1113 (ERISA § 413). Allowing the federal government, in effect, to be estopped frustrates federal statutes and infringes upon Congress's exclusive authority to make law.

[25] Neither the district court nor the defendants cite any authority grafting the EEOC exception onto ERISA. Defendants do cite *Martin v. Consultants & Adm'rs, Inc.*, 966 F.2d 1078 (7th Cir. 1992), but the majority in *Martin* pretermitted deciding whether laches applied by finding "the elements of laches have not been met in the case before us." 966 F.2d at 1091. *But see* 966 F.2d at 1100 (Posner, J., concurring).

V. CONCLUSION

In conclusion, the *Knop* private settlement does not bar the Secretary's independent right to sue under ERISA in this case. Accordingly, the district court erred in granting summary judgment in favor of the defendants SCNB and the Ficklings. The Secretary's action may proceed against SCNB as a fiduciary for legal and equitable relief and civil penalties. The Secretary's action may proceed against the Ficklings as "parties in interest" for civil penalties and equitable relief, including but not limited to disgorgement of profits, recission, and restitution of Plan losses.[26]

Given our declaration that the Secretary's action may proceed, SCNB's third-party complaint seeking declatory judgment in the *Knop* action and SCNB's separate declatory judgment action are now resolved by this appeal. The court directs that judgment on the declatory judgment issue be entered in favor of the Secretary.

For the above reasons, we REVERSE the district court's orders granting summary judgment and VACATE the final judgments entered in favor of the defendants SCNB and the Ficklings. The action is REMANDED for further proceedings consistent with this opinion.

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[26] When the case returns to the district court, each party should be allowed to complete discovery, including on whether each of the Fickling defendants is a "party in interest" under ERISA § 406. Also, the Ficklings argue that the Secretary should not be able to rely on § 3(14)(H) as to certain Fickling defendants because the Secretary referred to only § 3(14)(G), (E), and (F) as to those particular persons or entities. However, the Secretary's allegation, that the Ficklings are "parties in interest" under § 3(14) engaging in a transaction prohibited under § 406, was more than sufficient to put the Ficklings on notice of the Secretary's claims. Any failure to specify each and every sub-subsection of § 3(14) as to each and every person is immaterial.

APPENDIX B

[Filed Nov. 6, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CV 91-L-1075-NE
(Consolidated)

FRANCIS J. KNOP and MILLIE SMITH,
Plaintiffs,

vs.

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants.

SOUTH CAROLINA NATIONAL BANK,
Third-party plaintiff,

vs.

JAMES B. DAHER, *et al.*,
Third-party defendants.

CV 92-L-1544-NE
(Consolidated)

SOUTH CAROLINA NATIONAL BANK,
Plaintiff,

vs.

ROBERT REICH,
Secretary of Labor, U.S. Department of Labor,
Defendant.

CV 92-L-2858-NE
(Consolidated)

ROBERT REICH,
Secretary of the United States Department of Labor,
Plaintiff,

vs.

SOUTH CAROLINA NATIONAL BANK, *et al.*,
Defendants.

MEMORANDUM OPINION

South Carolina National Bank ("SCNB") has filed a motion for partial summary judgment as to the representative claims for monetary relief asserted by the Secretary of Labor ("Secretary"). This court concludes that the Secretary's representative claims for pecuniary relief are precluded under each of the three doctrines of laches, res judicata, and release.

I.

On May 10, 1991, two participants in the Charter Medical Corporation ("Charter") employee stock ownership plan ("ESOP") filed a complaint with this court on behalf of an alleged class of all participants in the ESOP. The participants claimed that various fiduciaries of the ESOP—including Charter (the employer), William A. Fickling, Jr. (Charter's founder who sold stock to the ESOP), Interstate/Johnson Lane Corporation (the financial adviser hired to price the Charter stock purchased by the ESOP) and SCNB (the trustee of the ESOP)—had violated ERISA by causing the ESOP to pay too much for the Charter stock purchased by the ESOP in 1990. On March 27, 1992, the participants signed an extensive settlement agreement with all the defendants. That same day, this court entered an order certifying a class that included all the ESOP participants. This court

directed the parties to notify all the class members and the Secretary of the proposed settlement, and this court scheduled a hearing for April 30, 1992. At that hearing, this court received comments from individual participants, but the Secretary chose not to appear. This court entered an order approving the settlement agreement. The settlement included the following benefits to the ESOP and its participants and beneficiaries:

1) $30 million in loan forgiveness of the $70 million debt owed by the ESOP on the loan from the 1990 transaction;

2) $40 million in accelerated contributions (subject to certain conditions) by Charter to the ESOP in connection with the $70 million debt owed for the 1990 transaction;

3) a new retirement plan (the "New Plan") established by Charter under Internal Revenue Code § 401(k) as a subplan of the ESOP, permitting deferred compensation to eligible employees under § 401(k); and

4) over $12.3 million in contributions from Charter to the New Plan, and certain direct payments to be paid between July 1, 1992, and January 2, 1996.

Six weeks later, on June 19, 1992, the Secretary wrote SCNB and demanded that SCNB pay $80 million to the ESOP, rescind the 1990 transaction, and consent to further injunctive relief to bar SCNB from serving in the future as a fiduciary to any ERISA plan. SCNB responded by filing a complaint to enforce the class action settlement against the Secretary. Two weeks later, the Secretary filed suit in the United States District Court for the Middle District of Georgia, despite the fact that in the settlement order this court had retained continuing jurisdiction over all matters relating to the settlement.

SCNB filed a motion to transfer the Georgia action to this court, and the motion was granted. This court subsequently consolidated the Secretary's action with the earlier class action and with SCNB's complaint against the Secretary.

After an opportunity for discovery, SCNB filed a motion for partial summary judgment as to the Secretary's claims for monetary relief. Before a ruling was entered on said motion, the Secretary and SCNB by letter dated January 29, 1996, submitted a proposed statement of issues to be set for trial and a plan for additional discovery on those issues. In addition, in this letter, the Secretary and SCNB jointly invited the court to explore with the parties the possibility of reaching an overall settlement of this litigation.

After the additional discovery, the court convened several settlement conferences as requested by the parties. The court emphasizes that at these conferences the attorneys operated in the highest tradition of civility. Despite the efforts of the court and the parties, no settlement was reached. As earlier indicated, now this court grants SCNB's motion for partial summary judgment as to the Secretary's representative claims for monetary relief on behalf of the Charter ESOP.

II.

In his First Amended Complaint, the Secretary alleges (1) that SCNB violated its fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), when the ESOP acquired Charter common stock on February 15, 1990, and (2) that SCNB caused the ESOP to enter into a transaction prohibited by ERISA § 1106(a)(1), 29 U.S.C. § 1106(a)(1), by allowing the ESOP to pay more than "adequate consideration," as defined in ERISA § 3(18), 29 U.S.C. § 1002 (18), when the ESOP acquired Charter common stock on February 15, 1990. Accordingly, the

Secretary's Complaint seeks to recover the same alleged losses on behalf of the same ESOP under the same section of ERISA and based on the same stock purchase as the participants sought and settled in the earlier class action.

The Secretary asserts claims for relief against SCNB pursuant to ERISA §§ 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2) & (5). Secretary's First Amended Complaint ¶ 5. Section 502(a)(2) authorizes the Secretary to bring suit in a representative capacity on behalf of a plan against a fiduciary for appropriate relief under ERISA § 409, 29 U.S.C. § 1109. *See Massachusetts Mutual Life Ins. Co. v. Russell,* 473 U.S. 134, 142 n.9 (1985) (explaining that Congress intended for § 502(a)(2) actions to "be brought in a representative capacity on behalf of the plan as a whole.") Section 502(a)(5) authorizes the Secretary to obtain injunctive relief and "other appropriate equitable relief" to redress violations of certain ERISA provisions. *See Mertens v. Hewitt Associates,* 508 U.S. 248, 260-61 (1993) (only equitable relief, not monetary damages, available under § 502(a)(5)).

III.

Each of the three doctrines of laches, res judicata, and release separately precludes the Secretary's representative claims for pecuniary relief.

A. Laches

The doctrine of laches bars relief for those who delay in asserting their claims for an unreasonable time. *See EEOC v. Dresser Indus., Inc.,* 668 F.2d 1199 (11th Cir. 1982) (holding that representative claims brought by the EEOC on behalf of private victims of discrimination can be barred by laches). As in *Dresser,* here the Secretary is making a representative claim for monetary relief on behalf of private persons. *See Martin v. Consultants & Administrators, Inc.,* 866 F.2d 1078, 1100

(7th Cir. 1992) (Posner, J., concurring) ("[Suits by the EEOC] are the same kind of suit as this; they are suits on behalf of private individuals in which any damages collected in the suit are paid over to the individuals rather than retained by the agency."). Thus, in order for laches to apply, this court must find both that the plaintiff delayed inexcusably in bringing the suit and that this delay unduly prejudiced the defendant. *Dresser,* 668 F.2d at 1202.

The Secretary concedes that he received all of the information and documents upon which his present claims are based long before the class action settlement fairness hearing, that his hired expert had explained the alleged deficiencies in the 1990 transaction more than a month before that hearing, and that he received a full set of the settlement documents a month in advance of their approval by this court. (Aff. of Messina ¶ 12; Aff. of Beaver ¶¶ 9, 11; Aff. of Schloss ¶¶ 12-13, 17). By that time, the Secretary had been investigating the Charter ESOP for two full years and had reviewed and been given the opportunity to review and copy every contemporaneous document SCNB had referable to the 1990 transaction.

Despite this notice, the Secretary chose not to appear at the April 30, 1992, hearing nor to advise the parties or this court of the Secretary's opinion that additional monetary relief for the class action plaintiffs was warranted. Instead, in his April 9, 1992, letter to the parties, the Secretary stated that he was not a party to the settlement agreement and thus did not consider himself bound by its terms. The Secretary added, however, that he did not wish to make the chances of "settling" the action any less likely.

The Secretary's having intentionally waived every opportunity to appear or to advise the court and parties of his opinions, the court and parties were led to reasonably

rely on his waiver as allowing the settlement to resolve finally all claims that might be brought on behalf of the ESOP. Accordingly, based in no small part on the reticence of the Secretary to express any substantive dissatisfaction with the settlement, this court approved the settlement agreement.

Included in the settlement was SCNB's release of all other persons from liability in this matter. The failure of the Secretary to express his dissatisfaction with the class action settlement agreement caused SCNB to continue to agree to and proceed to final judgment with the settlement, and thus to be bound by a release of other persons. These other persons include Mr. Fickling, who received proceeds from the ESOP for his Charter stock, and Interstate/Johnson Lane Corporation, who set the allegedly excessive price for Charter stock. SCNB never would have continued to support the settlement if it had known of the Secretary's imminent plans to proceed against SNCB in an alternate forum. Therefore, the Secretary's inexcusable delay unduly prejudiced SCNB. Thus, these undisputed facts are all that are needed to establish the defense of laches.

B. Res Judicata

Under the doctrine of res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were or could have been raised in that action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Manning v. City of Auburn*, 953 F.2d 1355, 1358 (11th Cir. 1992). The doctrine of res judicata applies where there is (1) a final judgment on the merits; (2) rendered by a court of competent jurisdiction; (3) with the same cause of action presented in both suits; and (4) with substantial identity of parties. *Manning*, 953 F.2d at 1358. In this case, all four requirements are met, and thus res judicata applies.

First, a final judgment exists, because a consent decree or a settlement has the same preclusive effect as a judgment. *See Richardson v. Alabama State Bd. of Ed.*, 935 F.2d 1240, 1244 (11th Cir. 1991). Second, there is no dispute that this court had jurisdiction to resolve the claims asserted in the class action.

Third, the same cause of action is presented in both suits. The claims by the participants and the claims by the Secretary both allege that SCNB violated ERISA in connection with the 1990 stock purchase made on behalf of the ESOP. Further, the Secretary's § 502(a)(2) claim for pecuniary relief under ERISA § 409 is the same claim as the participants' § 502(a)(2) claim under ERISA § 409 for pecuniary relief, which was settled in the class action.

Fourth, there is substantial identity of the parties. As conceded at oral argument, the Secretary's sole basis for claiming monetary relief for the ESOP from SCNB is under ERISA § 502(a)(2). (Transcript, June 22, 1993, pp. 41-46; *see* First Amended Complaint, p. 10, ¶ 3 (only seeking restitution from defendants other than SCNB)). In the class action, the participants already recovered pecuniary relief for the ESOP under § 502(a)(2). As the Supreme Court has explained, § 502(a)(2) claims are brought in a representative capacity only. *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142 n.9 (1985). A plan, such as the Charter ESOP, has substantial identity with itself, regardless of whether its § 502(a)(2) representative is the Secretary or was participants. *See Chicago, Rock Island & Pacific Railway Co. v. Schendel*, 270 U.S. 611, 619 (1926) (holding that the government "ought not be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of former adjudication"). Thus, res judicata applies to preclude the Secretary's claims for monetary relief.[1]

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[1] To be sure, different considerations might normally apply to the Secretary's claims for appropriate equitable relief under ERISA

C. Release

A release bars relitigation of those claims encompassed by the release by or on behalf of those persons covered by the release. *See United States v. Allegheny-Ludlum Indus., Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976). The class action settlement included a release of all claims for relief on behalf of the Charter ESOP and its participants and beneficiaries. In making a claim for monetary relief, the Secretary is attempting to bestow a pecuniary windfall upon the ESOP and thus the participants and beneficiaries of the ESOP. Because the ESOP and its participants and beneficiaries have already released any further claim for monetary relief, subsequent pecuniary relief is barred.

IV.

ERISA § 502(h), 29 U.S.C. § 1132(h), provides that the Secretary shall receive a copy of any complaint brought under ERISA (other than one for benefits owed), and that the Secretary shall then have the right to inter-

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§ 502(a)(5). The Secretary alone is authorized to sue under that section. Equitable relief barring a fiduciary from taking certain actions in the future arguably can serve to vindicate a broader public interest in preventing violations of the law. *See Donovan v. Cunningham*, 716 F.2d 1455, 1461-62 & n.10 (5th Cir. 1983) (noting that a prior private settlement might not bar Secretary's claims for equitable relief), *cert. denied*, 467 U.S. 1251 (1984); *Secretary of Labor v. Fitzsimmons*, 805 F.2d 682, 691-92 & n.12 (7th Cir. 1986) (en banc) (same). As such, the doctrine of res judicata might not preclude the Secretary's separate claims for appropriate equitable relief under ERISA § 502(a)(5). *See Brink v. DaLesio*, 88 F.R.D. 610, 613 (D.Md. 1980) (Secretary's tardy intervention in private participant's ERISA action denied, but denial "does not prevent the Secretary from filing an independent action to protect *any interests that have not been adjudicated in the present action*") (emphasis added), *modified in part on other grounds*, 667 F.2d 420 (4th Cir. 1981). This court is not now deciding whether such claims should or should not be nonetheless barred under the unique circumstances presented by this case.

vene. If the Secretary chooses not to intervene in the pending action, the Secretary knowingly risks the principles of laches, res judicata, and release precluding him from seeking the same relief in a later action. Indeed, the logical purposes for the Congressional grant of the Secretary's statutory right of intervention would be avoiding inappropriate preclusion of the Secretary by private parties and avoiding relitigation of the same claims for relief in two separate lawsuits.

In this case, not only was the Secretary provided a copy of the complaint, but he also knew that all affected ESOP participants and beneficiaries had chosen to settle for themselves all claims for monetary relief for their benefit; that this court was carefully scrutinizing a comprehensive class action settlement to ensure that the interests of all affected plan participants and beneficiaries were duly taken into account; and that each and every affected participant and beneficiary had received actual notice of the proposed settlement and an opportunity to object to it. Worse, the Secretary admittedly received advance notice of the settlement documents and fairness hearing at a time when the Secretary had in his possession not only his expert's present opinion, but the documents upon which that opinion and the Secretary's present claims for monetary relief are based. Despite all of this, the Secretary artfully remained silent rather than question the sufficiency, adequacy or fairness of the class action settlement before it was approved by the court; made no objection to the express release by SCNB, by the ESOP, and by the class of participants and beneficiaries of all claims for additional damages or other relief on their behalf; and took no action to advise the court or the parties of his position that additional monetary relief to the Charter ESOP and thus the class members was warranted. Instead, the Secretary deliberately avoided the statutory right of intervention that Congress has granted him, because he wanted to bring a second lawsuit seeking the

same relief in another forum a few weeks after the settlement was approved.

In granting the motion to transfer the Secretary's claim from Georgia, Judge Fitzpatrick observed:

> [I]f potential plaintiffs, plaintiffs who are represented by competent counsel and have a class certified and it is litigated—or at least negotiated—to a settlement approved by a United States District Court, that ought to end the matter, [and] the government should not be allowed to come in [afterward] merely because it feels the settlement was wrong or too low. . .

(Transcript of October 26, 1992, Hearing, pp. 39-42).

Congress conferred upon the Secretary the right to intervene. In an action affecting an ERISA plan and its beneficiaries, this court is charged with the responsibility of determining the consequences of the Secretary's deliberate and calculated refusal to exercise his right to intervene herein. This court believes that under the totality of the undisputed facts, the Secretary should be precluded as a matter of law and of equity from asserting a second claim seeking identical pecuniary relief.

Done this the 4th day of November 1996.

/s/ Seybourne H. Lynne
Senior Judge

APPENDIX C

[Filed Aug. 10, 1998]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 97-6058

D. C. Docket No. CV-92-2858-NE

ALEXIS HERMAN,
Secretary of the United States Department of Labor,
Plaintiff-Appellant,

versus

SOUTH CAROLINA NATIONAL BANK; CHARTER MEDICAL CORPORATION EMPLOYEE STOCK OWNERSHIP PLAN; WILLIAM A. FICKLING, JR.; BANK SOUTH OF MACON, Trustee under Agreement of William A. Fickling, Jr., Self-Employed Retirement Plan; NEVA L. FICKLING, *et al.*,

Defendants-Appellees.

No. 97-6154

D.C. Docket No. CV-91-L-1075-NE (lead case)

FRANCES J. KNOP; MILLIE SMITH,
Plaintiffs,

versus

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants,

SOUTH CAROLINA NATIONAL BANK,
Defendant-Cross-Claimant-Third Party Plaintiff-Appellee,

WILLIAM A. FICKLING, JR.;
J & R CAPITAL COMPANY, LTD.;
W & J CAPITAL COMPANY, LTD.;
Defendant-Third Party Plaintiffs-Appellees,

STANLEY S. TROTMAN,
Defendant-Cross-Defendant,

J. RODNEY LAUGHLIN; JAMES D. DAHER,
Third Party Defendants,

NEVA L. FICKLING; WILLIAM A. FICKLING, III, *et al.*,
Movants-Third Party Plaintiffs-Appellees,

ALEXIS HERMAN,
Secretary of the United States Department of Labor;
DEPARTMENT OF LABOR,
Third Party Defendants-Appellants.

D.C. Docket No. CV-92-L-1544-NE

SOUTH CAROLINA NATIONAL BANK,
Plaintiff-Appellee,

WILLIAM A. FICKLING, JR.;
J & R CAPITAL COMPANY;
W & J CAPITAL COMPANY;
NEVA L. FICKLING, *et al.*,
Intervenor-Plaintiffs-Appellees,

versus

ALEXIS HERMAN,
Secretary of the United States Department of Labor,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: EDMONSON and HULL, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
United States Circuit Judge

APPENDIX D

[Filed Nov. 6, 1996]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CV 91-L-1075-NE
(Consolidated)

FRANCIS J. KNOP and MILLIE SMITH,
Plaintiffs,

vs.

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants.

SOUTH CAROLINA NATIONAL BANK,
Third-party plaintiff,

vs.

JAMES D. DAHER, *et al.*,
Third-party defendants.

CV 92-L-1544-NE
(Consolidated)

SOUTH CAROLINA NATIONAL BANK,
Plaintiff,

vs.

ROBERT REICH,
SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,
Defendant.

CV 92-L-2858-NE
(Consolidated)

ROBERT REICH,
Secretary of the United States Department of Labor,
Plaintiff,

vs.

SOUTH CAROLINA NATIONAL BANK, *et al.*,
Defendants.

PARTIAL SUMMARY JUDGMENT

This cause came on to be heard upon cross-motions for summary judgment filed by the Secretary of Labor (the "Secretary") and filed by Wachovia Bank of South Carolina, N.A. (formerly known as South Carolina National Bank) ("SCNB"). Upon consideration of SCNB's motion for partial summary judgment, the evidentiary submissions in support thereof and in opposition thereto, the pleadings, and the arguments of counsel, it appears to the court that there is no genuine issue of material fact and that SCNB is entitled to judgment as a matter of law as to the Secretary's claims for monetary relief. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED as follows:

1. All claims of the Secretary of Labor for monetary relief against SCNB are hereby DISMISSED with prejudice, including without limitation all claims asserted under ERISA § 502(a)(2);

2. This Order does not adjudicate any of the Secretary's claims for non-monetary relief against SCNB under ERISA § 502(a)(5), or any of the Secretary's claims against any other party for any relief, monetary or non-monetary;

3. The Secretary's pending motion again seeking further discovery under Fed. R. Civ. P. 56(f) is hereby

OVERRULED for the same reasons expressed in other orders of this court; and

4. The Secretary's pending motion seeking additional expert discovery is DENIED as untimely.

Done this 4th day of November 1996.

/s/ Seybourn H. Lynne
Senior Judge

APPENDIX E

[Filed Jan. 15, 1997]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

CV 91-L-1075-NE
(Consolidated)

FRANCIS J. KNOP and MILLIE SMITH,
Plaintiffs,

vs.

CHARTER MEDICAL CORPORATION, *et al.*,
Defendants.

SOUTH CAROLINA NATIONAL BANK,
Third-party plaintiff,

vs.

JAMES D. DAHER, *et al.*,
Third-party defendants.

CV 92-L-1544-NE
(Consolidated)

SOUTH CAROLINA NATIONAL BANK,
Plaintiff,

vs.

ROBERT REICH,
SECRETARY OF LABOR, U.S. DEPARTMENT OF LABOR,
Defendant.

CV 92-L-2858-NE
(Consolidated)

ROBERT REICH,
Secretary of the United States Department of Labor,
Plaintiff,

vs.

SOUTH CAROLINA NATIONAL BANK, *et al.*,
Defendants.

ORDER

An order was entered on November 13, 1996 by the court in *Reich v. South Carolina National Bank*, CV 92-L-2858-NE (one of the three consolidated cases captioned above). Such order is amended to direct the clerk to enter judgment pursuant to Fed. R. Civ. P. 58.

DONE this 15th day of January 1997.

/s/ Seybourn H. Lynne
Senior Judge

APPENDIX F

STATUTES INVOLVED

ERISA § 409(a), 29 U.S.C. § 1109(a)

Sec. 409. **(a)** Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of § 411 of this Act [29 U.S.C. § 1111].

ERISA § 502(a)(2) and (5), 29 U.S.C. § 1132(a)(2), (5)

Sec. 502. **(a)** A civil action may be brought—

* * * *

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under § 409 [29 U.S.C. § 1109];

* * * *

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

ERISA § 502(h), 29 U.S.C. § 1132(h)

A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

No. 98-762

FILED
DEC 14 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,

Petitioner,

v.

ALEXIS M. HERMAN, Secretary of the United States Department of Labor,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF AMICI CURIAE, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA; ADMIRAL INSURANCE COMPANY; RELIANCE INSURANCE COMPANY; EVANSTON GROUP, INC.; GREAT AMERICAN INSURANCE COMPANY; SYNDICATE 435 AT LLOYD'S LONDON, D.P. MANN UNDERWRITING AGENCY, LTD.; SYNDICATE 1212 AT LLOYD'S LONDON, S.J. BURNHOPE AND OTHERS; SYNDICATE 79 AT LLOYD'S LONDON, JANSON GREEN, LTD.; AND SYNDICATE 861 AT LLOYD'S LONDON, M.E. BROCKBANK SYNDICATE MANAGEMENT, LTD.

IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OF SOUTH CAROLINA NATIONAL BANK

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INTEREST OF AMICI CURIAE

Amici curiae[1] are carriers that insure bank trust departments, corporate directors and officers, lawyers, accountants and others against professional liability claims. The insurance offered by amici includes coverage for the defense and settlement of lawsuits, like this one, alleging breach of fiduciary duties under ERISA. Amici also filed a brief in this matter in the United States Court of Appeals for the Eleventh Circuit.

Amici regularly deal with claims against their insureds that are filed, or are threatened to be filed, in various state and federal courts. At least until now, experience has shown that most claims are resolved by compromise and settlement—either before or after commencement of litigation. Where resolution of a claim is possible without resort to the courts, typically the settlement is documented by a written agreement and includes a release of all claims for which monetary relief is or might be sought. Where litigation has been commenced, the settlement agreement and release are usually accompanied by a final judgment dismissing the claim or confirming the settlement terms, entered by the court that has exercised jurisdiction over the dispute. This is the reality of our civil liability system; although many claims are litigated, relatively few are resolved by a full trial on the merits.

In fact, under the laws of many states, insurers are required to accept reasonable settlement demands with-

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[1] This brief is filed with permission of the parties. Written consents have been provided to the Clerk of the Court. All of this brief was authored by the undersigned counsel and the cost of the brief was borne entirely by amici.

in policy limits; if they refuse such demands, they face potential liability in excess of policy limits for "bad faith." *See, e.g. State Farm Mut. Auto. Ins. Co. v. Hollis*, 554 So. 2d 387, 389-90 (Ala. 1989); *Short v. Dairyland Ins. Co.*, 334 N.W.2d 384, 387 (Minn. 1983); *Commercial Union Ins. Co. v. Safeway Stores, Inc.*, 610 P.2d 1038, 1040 (Cal. 1980); *G.A. Stowers Furniture Co. v. American Indem. Co.*, 15 S.W.2d 544, 547-48 (Tex. Comm'n App. 1929). In evaluating whether a settlement demand is reasonable and in the best interests of the insured, an insurer must weigh anticipated litigation costs and the risk of an adverse judgment against the benefits attendant to the settlement. In the class action context, insurers must also consider the number and identity of persons who may opt out of the settlement in order to assess the scope of protection provided by the proposed releases.

The Eleventh Circuit's decision in this matter forces amici into a trap similar to the infamous "Catch-22." On the one hand, they are duty-bound to protect their insureds by pursuing reasonable settlements of private ERISA fiduciary liability claims within policy limits; on the other hand, they can never obtain reasonable protection for their insureds because there will always remain a prospect of future litigation by the Secretary over the same claims—the second time, of course, with reduced or depleted coverage. Disturbingly, the ramifications of the decision below are not limited to the Department of Labor and ERISA fiduciary liability claims. The Eleventh Circuit's reasoning allows any federal agency having enforcement powers to seek additional monetary relief for members of a class subsequent to and in spite of a determination by a federal district

judge pursuant to Fed. R. Civ. P. 23(e) or 23.1 that the amount of the settlement agreed to by the class is fair and reasonable.

Amici believe it beyond dispute that fewer defendants would be willing to settle private ERISA claims if they would remain fully exposed to the same liability on identical claims should the Secretary later choose to sue them. Perhaps some would continue the litigation until the limitations period applicable to the Secretary expired, settling thereafter on the same or similar terms. Others might consider an earlier settlement despite the continuing risk, but almost certainly would not be willing to pay as much as they would if finality could be assured. The remainder would be forced to proceed to trial on claims that otherwise might have been settled. The same dynamic is likely to occur in the myriad of other contexts where Congress has created both a private right of action and a regulatory enforcement function entitling a government agency to seek monetary relief for private individuals. Complex civil cases will be more likely to proceed to trial, which will make it more difficult for trial courts to manage their dockets effectively.

It is this prospect that gravely concerns amici and prompts them to submit this brief. Currently, professional liability insurance is an expensive commodity.[2] And this is true now, when nearly every case is resolved before trial. If a greater percentage of complex

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[2] For example, the average premium in 1997 for primary directors' and officers' liability insurance was $233,480. 1997 Watson Wyatt Worldwide D & O Liability Survey Report at 3.

claims were expected to go to trial, amici would be forced to raise premiums substantially, limit coverage more extensively, and perhaps even discontinue some of their fiduciary liability programs. Increased difficulty in obtaining liability coverage would, in turn, limit the ability of fiduciaries to respond to claims—meritorious or otherwise—and to compensate plan participants for their losses. A lack of adequate and affordable coverage would deter qualified fiduciaries from representing employee benefit plans altogether. Furthermore, analogous repercussions might alter the structure of other insurance programs, such as those aimed at risks stemming from alleged violations of employment, consumer protection or securities statutes.

ARGUMENT

A. The Eleventh Circuit's Decision Undermines the Incentives to Settle and the Finality of Judgments.

1. The Decision Below Undermines the Strong Judicial Policy Favoring Settlement.

There is a strong federal policy favoring pretrial settlement of class action lawsuits. This Court recently instructed that, under some circumstances, it is proper to certify a class action for settlement purposes even if a class could not be certified on an adversarial basis. *Amchem Prods. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2248 (1997). Recognizing that in a class action persons who did not actively participate in the litigation would be bound by a judgment entered upon settlement, Congress provided in Rule 23(e) that:

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Fed. R. Civ. P. 23(e). Rule 23.1, which applies to derivative actions, contains substantively identical language.

This Court has established a number of "requirements a class action money judgment must meet if it is to bind absentees; those requirements include notice, an opportunity to be heard, a right to opt out, and adequate representation." *Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367, 395 (1996) (Ginsburg, J., concurring and dissenting) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)). As *Shutts* reiterated, these requirements are grounded in procedural due process. *Hansberry v. Lee*, 311 U.S. 32, 45 (1940).

Here, the parties provided notice of the proposed settlement to the class and the Secretary. The district court approved the settlement only after conducting an evidentiary hearing to determine whether the proposed settlement was fair, reasonable, adequate and in the best interests of the class. The district court's determination should not be vulnerable to attack absent evidence of fraud or collusion. In other words, the Secretary should not be permitted to substitute her own notions of fairness for those of the district court, particularly when she consciously chose not to appear at the hearing. The Eleventh Circuit's holding undermines the entire purpose of the class action device, which is to conserve the resources of both the courts and the parties by allowing an issue affecting each member of a

class to be litigated only once. *General Tel. Co. v. Falcon*, 457 U.S. 147, 155 (1982); *Califano v. Yamasaki*, 442 U.S. 682, 700 (1979).

If class actions are to settle, Rule 23(e) must provide an assurance of finality not only to the class members but to the defendants and their insurers. A district court's approval of a settlement and the accompanying releases must provide certainty that the settled claims have been fully and finally resolved. The Eleventh Circuit's decision, however, diminishes the incentives for defendants and their insurers to compromise claims given the prospect of future lawsuits brought by government agencies asserting the settled claims.

2. The Eleventh Circuit's Decision Undermines Confidence in the Finality of Judgments.

The district court held that the doctrines of res judicata and release precluded the Secretary's claims against Petitioner for money damages under Section 502(a)(2)[3] because the Secretary could obtain such relief only on behalf of the class that had previously settled. The doctrine of res judicata (or claim preclusion) promotes legal economy and certainty. It ensures the finality of judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes. *Brown v. Felsen*, 442 U.S. 127, 131 (1979). To promote these interests, the lower courts have regularly applied the doctrine, even when it prevented a government agency

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[3] 29 U.S.C. § 1132(a)(2). This statute authorizes both the Secretary of Labor and private parties to bring civil suits for breach of fiduciary duty against ERISA plan fiduciaries.

from bringing suit on behalf of persons who had previously resolved their own claims. *See, e.g., FTC v. AMREP Corp.*, 705 F. Supp. 119, 124-25 (S.D.N.Y. 1988) (barring government claims under principles of res judicata and release out of respect for finality of earlier private settlement). South Carolina National Bank ("SCNB") cites numerous other authorities on this point (*see* SCNB Pet. at 8-12), and amici will not duplicate its argument.

The tension between the Eleventh Circuit's decision and the approaches the lower courts have taken is illustrated by *In re Baldwin-United Corporation*, 770 F.2d 328 (2d Cir. 1985). Although decided under the All Writs Act, 28 U.S.C. § 1651, *Baldwin-United* stands for the proposition that government agencies will not be permitted to disturb a court-approved class action settlement by relitigating claims on behalf of settling parties. In that case, private plaintiffs were on the verge of settling a multi-district class action consolidated in the district court. Before the settlement was finalized, several state attorneys general announced their intention to invoke various state laws authorizing them, in their representative capacities, to seek restitution and monetary recovery for the same plaintiffs. Fearing that the threatened state court actions would jeopardize the settlement, substantially increase the costs of the litigation, and create a risk of inconsistent results, the district court enjoined all conflicting state proceedings in order to preserve its jurisdiction. *Id.* at 333.[4]

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[4] The Second Circuit was careful in *Baldwin-United* to distinguish between claims to be brought by the attorneys gen-

(continued...)

The Second Circuit upheld the injunction, noting that once judgment was entered, the parties could invoke res judicata in state courts to bar the threatened suits. Because the class plaintiffs had agreed to release all claims against defendants, a post-settlement injunction would have precluded the attorneys general from bringing state law claims derivative of plaintiffs' rights. *Id.* at 336. The Second Circuit recognized that no defendant could reasonably be expected to settle claims if those same rights could be reasserted by a state or any other representative seeking to recover money on behalf of the settling plaintiffs. *Id.* As the court put it,

> The success of any federal settlement [is] dependent on the parties' ability to agree to the release of any and all related civil claims the plaintiffs [have] against the settling defendants based on the same facts. If states or others could derivatively assert the same claims on behalf of the same class or members of it, there could be no certainty about the finality of any federal settlement.

Id. at 337.

Such reasoning ought to apply with equal force to this case. If the Eleventh Circuit is correct and the Secre-

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[4] (...continued)
eral in a representative capacity and those to be brought on behalf of the public at large, such as claims for injunctive relief or to enforce criminal laws. 770 F.2d at 339, 341. While the former were enjoined, the latter were not. This distinction comports with the public interest/private benefit analysis undertaken by numerous courts applying the doctrine of representative claim preclusion against government agencies which is discussed more fully in both of the Petitions and the next section of this brief.

tary may pursue her claims for pecuniary relief, defendants could not reasonably be expected to settle private ERISA fiduciary liability claims nearly as often as they have in the past. Under a looming threat of government action, such defendants would either refuse to settle or, at a minimum, reduce the amounts they would be willing to pay to account for their continuing exposure on the same claims. As the Second Circuit noted, similar considerations would undermine the desirability and, consequently, the odds of settlement in any situation where a government agency can derivatively re-assert the money damages claims that the private parties have already settled.

If the Secretary is correct that she is not bound by the monetary terms of private settlements, parties contemplating settlement of ERISA suits might be forced to attempt joinder of the Secretary in order to ensure finality and shield defendants from successive litigation and inconsistent obligations. *See* Fed. R. Civ. P. 19(a)(2)(ii). The Secretary, however, asserted in the district court that she is not amenable to involuntary joinder in ERISA cases. (*See* Secretary of Labor's Objections to Motion to Consolidate, Motion for Leave to File Third Party Complaint and Motion for Status Conference and For Stay of Discovery Pending Status Conference, at 20-24) ("There is no basis for SCNB's assertion that the Secretary's asserted interest creates a risk of inconsistent or multiple obligations or that Rule 19 provides a means of compelling the Secretary to participate in litigation between private parties."). If the Secretary's position is upheld, no district court could finally and forever dispose of a private Section 502(a)(2) claim by the force of its judgment. The specter

of additional litigation by the government would always remain.

Even if joining the Secretary were a simple matter, common sense suggests that the addition of the Department of Labor as a party to a private ERISA case would inevitably lead to increased delays, greater litigation costs, and an unnecessary expenditure of judicial resources. According to the Director of the Administrative Office of the United States Courts, between October 1, 1996 and September 30, 1997, 10,045 ERISA lawsuits were filed in the United States District Courts. *See* Judicial Business of the United States Courts, 1997 Report of the Director, Table C-2. Of these 10,045 suits, only 168 involved the United States government (141 as plaintiff, 27 as defendant); the remaining 9,877 involved only private parties. *Id.*[5] During that same twelve-month period, 98.2% of all ERISA cases settled or were otherwise resolved prior to trial; only 1.8% actually reached the trial stage. *Id.* at Table C-4.[6]

If, as a result of the Eleventh Circuit's decision, ERISA defendants concluded they had to join the Secretary to ensure finality, there would inevitably be lengthy delays and an excessive drain on judicial resources. Instead of direct involvement in 168 cases per year, the Secretary's participation might be required in

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[5] The Report of the Director does not contain statistics distinguishing fiduciary liability suits under Section 502(a)(2) from other ERISA actions.

[6] The statistics quoted from Table C-2 reflect the commencement of ERISA cases, while the statistics reported in Table C-4 reflect the disposition of "other labor litigation," a somewhat broader category made up primarily of ERISA cases.

many more of the remaining 9,877 cases. If, on the other hand, the Secretary's joinder in ERISA suits cannot, as she asserts, be compelled, then many more of the 98% of ERISA fiduciary liability cases that now settle would have to be tried to their costly conclusion—with the remainder either settled for amounts less than the plaintiffs could obtain if they could sell complete peace, or litigated until either the Secretary commenced a parallel action or the applicable limitations period expired.

In short, the holding below jeopardizes settlement in nearly all ERISA fiduciary liability cases between private parties and is likely to further clog the dockets of the federal courts. Moreover, under a variety of other statutory schemes, private parties, confronted with the Eleventh Circuit's reasoning, may be reticent to settle for fear of further government enforcement actions brought by agencies seeking to augment the private plaintiffs' recovery.

B. The Eleventh Circuit's Decision Is Untenable.

In addition to its inconsistency with important judicial policies, the decision below is inconsistent with the doctrines of res judicata and release.

1. Res Judicata Precludes Representative Claims by Government Agencies on Behalf of Persons Who Previously Settled the Same Claims.

Under principles of res judicata (or representative claim preclusion), a final judgment on the merits bars further claims by parties or their privies based on the

same cause of action. *Montana v. United States*, 440 U.S. 147, 153 (1979). This principle applies with equal force in a class action. As this Court explained in *Cooper v. Federal Reserve Bank of Richmond*:

> There is of course no dispute that under elementary principles of prior adjudication a judgment in a properly maintained class action is binding on class members in any subsequent litigation. Basic principles of res judicata (merger and bar or claim preclusion) and collateral estoppel (issue preclusion) apply. A judgment in favor of the plaintiff class extinguishes their claim, which merges into the judgment granting relief. A judgment in favor of the defendant extinguishes the claim, barring a subsequent action on that claim. A judgment in favor of either side is conclusive in a subsequent action between them on any issue actually litigated and determined, if its determination was essential to that judgment.[7]

467 U.S. 867, 874 (1984) (citations omitted).

In the present case, there is privity between the government agency (the Department of Labor) and the class of private individuals that earlier settled. With respect to the Department of Labor's claims for monetary relief, privity turns on whether the agency is acting to vindicate a broad public interest or, instead, is seeking relief in a representative capacity. The district court acknowledged the Secretary's interest in safeguarding the public interest by permitting her to

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[7] This language was recently quoted with approval in the majority opinion in *Matsushita*, 516 U.S. at 379.

pursue her claims for equitable relief. The district court, however, correctly found that the Secretary's representative claims for monetary relief on behalf of the plan participants were barred by the doctrine of res judicata.

The Eleventh Circuit's reliance on the "general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests," SCNB App. at 22a, ignores the crucial fact that the only interest the Secretary has left in the present case is to obtain more money for a class that has already settled with the same defendants the Secretary is pursuing. SCNB Pet. at 8 (noting that the injunctive and declaratory relief claims raised by the Secretary have been settled and citing the relevant pages of the record). That interest is strictly private. Hence, the decision below expands and twists the principle upon which it relies beyond recognition.

There is simply no reason why a government agency acting in a purely representative capacity should not be bound by a prior settlement knowingly entered into by those the agency purports to represent. The interests of the class are fully protected by Fed. R. Civ. P. 23 and the Due Process Clause. Private class litigation is intended, by Congressional design, to "provide a significant supplement to the limited resources available" to the federal government to enforce the law and deter violations. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979). When such litigation is successfully settled, after court approval and with the government's informed acquiescence, established principles of res judi-

cata ought to preclude the government from relitigating the claim for monetary relief. The tension between the Eleventh Circuit's decision and the doctrine of res judicata justifies this Court's review of the decision below on its merits.

2. The Doctrine of Release Bars the Secretary's Representative Claims for Pecuniary Relief.

A valid release bars the relitigation of all claims encompassed by the release by or on behalf of those persons covered by the release. This Court has previously noted that an individual's acceptance of benefits from a government enforcement action brought in a representative capacity can be conditioned upon a release of the "right to bring a separate private action." *General Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980). Analogously, the lower courts have held that private parties can release the right to have an action brought on their behalf. *See, e.g., FTC v. AMREP Corp.*, 705 F. Supp. at 125; *Korn v. Franchard Corp.*, 388 F. Supp. 1326 (S.D.N.Y. 1975) (courts will not interfere with a party's knowing and voluntary decision to bargain away his rights out of concern that a federal statute might be under-enforced). In *FTC v. AMREP Corp.*, the court enforced a voluntary and knowing release of claims executed by a group of land purchasers pursuant to a class action settlement and precluded the FTC from bringing a separate action to the extent it sought relief on behalf of the settling class members. 705 F. Supp. at 125.

Courts regularly enforce broad releases executed pursuant to class action settlements, including releases of

claims outside the settlement court's jurisdiction as well as releases binding persons who did not consent to the settlement. For example, in *Matsushita*, this Court upheld the preclusive effect of a state court class action settlement notwithstanding that, pursuant to the settlement, the class plaintiffs had released securities claims within the exclusive jurisdiction of the federal courts.

Here, the class action settlement included a release of all existing and potential claims on behalf of class members. The class members' bargain to release these claims should be enforced, and the Secretary should be precluded from bringing an action to the extent it seeks relief on the releasors' behalf. As a practical matter, attaching preclusive effect to the class action settlement at issue here should be far less troubling than it was to the dissenters in *Matsushita*. This is true because the claim the Secretary seeks to pursue here is founded upon the same statutory provision as the claim litigated and settled in the private class action.

There has been no suggestion in the present case that the settlement of the private class action was inconsistent with the dictates of Rule 23 or the requirements of procedural due process. Unless the release is enforced in this case, the finality of virtually every private ERISA fiduciary liability settlement could be defeated by subsequent suits filed by the Secretary on behalf of the settling plaintiffs. Inevitably, the prospect of such additional litigation would reduce, if not eliminate, the chances for settling the vast majority of ERISA cases. Failure to enforce the release here could also undermine the finality of settlements of claims based upon any federal statute allowing for both private party and

government enforcement, thereby affecting a wide variety of employment, consumer protection, and securities claims.

To take it a step further, if the class members' releases are not enforced in this case, insurers may refuse to participate in the settlement of many complex cases. When evaluating whether a proposed settlement is reasonable, insurers must consider the scope of the releases to be given to the insured party. In many circumstances, insurers insist on indemnification or judgment reduction agreements (or both) from private plaintiffs where fewer than all claims against the insured are resolved. If insurers cannot be certain that releases will be upheld, however, they will not be able to assess the reasonableness of proposed settlements and may be far less likely to fund settlements.

CONCLUSION

The professional liability insurance carriers that have joined as amici curiae urge this Court to grant the petition for a writ of certiorari so as to consider, as a matter of both law and public policy, whether the prior class action settlement bars the Secretary from bringing her claim for pecuniary relief in a representative capacity.

Respectfully submitted,

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(3)

No. 98-762

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,
Petitioner,
v.
ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF THE PETITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-762

SOUTH CAROLINA NATIONAL BANK,
Petitioner,

v.

ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF *AMICUS CURIAE* OF THE ASSOCIATION OF PRIVATE PENSION AND WELFARE PLANS IN SUPPORT OF THE PETITION

INTEREST OF THE *AMICUS* [1]

The Association of Private Pension and Welfare Plans ("APPWP") is a broad-based, non-profit trade association founded in 1967 to protect and foster the growth of this Nation's private employer-sponsored employee benefit plan system. The members of the APPWP include both small and large employer sponsors of employee benefit

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[1] No person or entity other than APPWP-member South Carolina National Bank ("SCNB") has made monetary contributions toward this brief, and no counsel for any party authored any portion of the brief. APPWP has filed with the Clerk of the Court the consents of counsel for the parties to file this brief.

plans (including many Fortune 500 companies), as well as numerous plan support organizations, such as consulting and actuarial firms, investment firms, banks, insurers and other professional benefit organizations. Collectively, its approximately 240 members sponsor or administer plans covering more than 100 million plan participants.

This broad-based membership provides the APPWP with substantial expertise and experience in the entire spectrum of issues relating to all types of benefit plans, and the APPWP has filed *amicus curiae* briefs in numerous cases involving important issues for the employee benefit plan community. The issue presented by this case —whether the Secretary of Labor may seek additional monetary recovery on behalf of an employee benefit plan on a fiduciary breach claim that has been settled and released previously by the plan's representatives—is of vital importance to the members of APPWP. For this reason, APPWP respectfully submits this brief urging that the Petition for a Writ of Certiorari be granted.

SUMMARY OF ARGUMENT

In the decision below, the court of appeals held that the Secretary of Labor could pursue claims for monetary relief on behalf of a plan against a party which previously had been released from such liability as a part of a court-approved private settlement. ERISA claims for breach of fiduciary duty seeking money damages are, by definition, representative claims brought on behalf of the plan, whether the named plaintiff is a fiduciary, a participant, or the Secretary. *Massachusetts Mutual Life Ins. v. Russell*, 473 U.S. 134, 146-47 (1985). Once settled and released, necessarily on behalf of the plan, by any of the representatives authorized to bring an action, such claims are extinguished. *See Nottingham Partners v. Trans-Lux Corp.*, 925 F.2d 29-31-32 (1st Cir. 1991). The decision of the court of appeals, therefore, is inconsistent with well-settled principles of *res judicata* and release—princi-

ples that effectuate the dual policies of finality and the encouragement of settlements.

Because of its unsettling effect, the decision below will contribute significantly to the mounting burden of maintaining employee benefit plans. As these burdens increase, so does the inclination of plan sponsors to reduce or eliminate benefits. They are, of course, free to do so: while ERISA regulates certain aspects of their design and operation, employee benefit plans are, as a general matter, creations of the sponsoring employer. Employers decide whether to establish a plan and the level of benefits provided. *See, e.g., Alessi v. Raybestos-Manhatton, Inc.*, 451 U.S. 504, 510-11 (1981). And employers are generally free to amend or terminate their plans in their discretion. *Lockheed Corp. v. Spink*, 517 U.S. 882, 890-91 (1996). The legislative history of ERISA reveals Congress's awareness that, in light of the voluntary nature of employee benefit plans, care must be taken to avoid overregulation that would impede the creation and growth of benefit plans. H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. Because it will inevitably lead to an increase in the costs associated with maintaining employee benefit plans, the decision below undermines this important congressional goal.

Moreover, the decision below comes at a time when the volume of ERISA litigation is already on the increase. Indeed, more than 10,000 ERISA cases were commenced in fiscal year 1997 alone, an increase of 4 percent from the prior year. Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1997*, Tables C-2, C-2A.[2] The overwhelming majority of these cases

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[2] This trend is likely to continue in the wake of several of the Court's recent decisions. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996) (participants may bring an action, seeking personal equitable relief, for breach of fiduciary duty); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry.*, 520 U.S. 510

are instituted by private parties; historically, the overwhelming majority are disposed of by settlement. Any impediment to the ability of private parties to settle their disputes can only increase the costs of litigation and thus the expense of maintaining benefit plans.

Nor is the public interest in the Secretary's enforcement role inconsistent with the policies favoring finality, settlement of disputes, and the continued growth of our private employee benefit plan system. The statutory scheme itself accommodates these interests. By statute, private parties initiating actions for fiduciary breach are required to serve a copy of their complaint on the Secretary. By statute, the Secretary is accorded the right, in her discretion, to intervene in any such litigation. Thus, the Secretary has the right to participate as a party in privately-initiated actions any time she believes the plan's interests might not be adequately protected by the private plaintiffs. In addition, the Secretary has the option, in lieu of intervening, to sue the fiduciaries who caused a plan to enter into any settlement that she finds objectionable. And, of course, nothing in the position urged by Petitioner would affect the Secretary's ability to seek declaratory or injunctive relief in a subsequent action. This regime enables the Secretary to fulfill her enforcement responsibilities and protect participants' interests without unduly burdening our private employee benefit plan system by sacrificing the benefits of voluntary settlements and finality.

ARGUMENT

In this case, the Secretary of Labor, on behalf of a pension plan, seeks a monetary recovery from SCNB for

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(1997) (ERISA's prohibition on interference with statutorily-protected rights extends to nonvested welfare benefits); *New York State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645 (1995) (state imposed surcharges on medical services designed to influence purchasing decisions of employee benefit plans are not preempted).

an alleged breach of fiduciary duty relating to a 1990 stock transaction. The court of appeals ruled that the Secretary's action could proceed, even though a class of all of the plan's participants, also on behalf of the plan, had previously released SCNB from all liability in connection with the 1990 transaction in a court-approved settlement. The court of appeals' ruling is erroneous as a matter of law and both unfortunate and unnecessary as a matter of policy.

I. THE DECISION BELOW CANNOT BE RECONCILED WITH THIS COURT'S INTERPRETATION OF ERISA'S CIVIL ENFORCEMENT SCHEME

In the district court, separate actions were brought against SCNB under §§ 409 and 502(a)(2) of ERISA for breach of fiduciary duty by a class of plan participants and by the Secretary. Both of the separate actions challenged the same transaction and were asserted against the same defendants. Both sought monetary relief from SCNB (and the other defendants) on behalf of the Charter Medical Corporation Stock Ownership Plan. There was, however, one significant difference between these two cases —the Secretary's action was not commenced until *after* a settlement had been reached by the private parties and approved by the district court.

The settlement provided for a substantial monetary recovery by the plan to be funded by defendant Charter Medical Corporation, the plan's sponsor, consistent with its obligation to indemnify SCNB and certain other defendants. As part of the settlement, the private plaintiffs, on behalf of the plan, released the defendants from further monetary liability. The district court approved the settlement after a fairness hearing and subsequently dismissed the Secretary's complaint. *See generally* Pet. at 3-5. In reversing dismissal of the Secretary's action, the court of appeals held that the prior settlement did not preclude the

Secretary from seeking additional monetary relief for the same plan from the settling defendants on the same claim for relief.

The decision of the court of appeals is erroneous in that it fails properly to apply principles of *res judicata* and release in the context of ERISA claims for fiduciary breach seeking money damages. Such claims, under ERISA's comprehensive enforcement scheme, may be brought by "the Secretary, or by a participant, beneficiary or fiduciary" and may seek "appropriate relief under § 409." ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2). Section 409, in turn, prescribes the relief that may be awarded against "[a]ny person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations or duties imposed upon fiduciaries by this title." 29 U.S.C. § 1109(a). Such relief includes a monetary recovery to compensate for "any losses to the plan resulting from each such breach." *Id.*

This Court held in Russell that §§ 409 and 502(a)(2) claims are brought in a representative capacity on behalf of the plan as a whole:

> A fair contextual reading of the statute makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.

473 U.S. at 142. As a matter of law, then, these claims are representative claims brought on behalf of the plan as an entity, no matter who—a participant, a fiduciary, a beneficiary, or the Secretary—asserts them. It follows that no party, not even the government, can pursue such a claim after it has been settled and released. *See Chicago, Rock Island & Pacific Ry. v. Schendel,* 270 U.S. 611, 619 (1926).

This Court has long espoused a policy favoring the voluntary settlement of litigation. *See, e.g., Williams v. First National Bank,* 216 U.S. 582, 595 (1910). And *res judicata* is vital in order to "avoid the expense and vexation attending multiple lawsuits, conserve[] judicial resources, and foster[] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153-54 (1979). Because the court of appeals did not give effect to the representative nature of § 502(a)(2) claims, it failed properly to apply principles of preclusion and release. The result casts a cloud of uncertainty over private ERISA fiduciary litigation. And the adverse consequences for the employee benefit plan community can be expected to spread as ERISA litigation increases.

II. THE DECISION BELOW IS MISGUIDED AS A MATTER OF POLICY

A. Continued Increase in Plan Costs, Including the Cost of Litigation, Discourages the Formation of Private Employee Benefit Plans

In enacting ERISA, Congress was concerned that its regulatory efforts not be so onerous as to encourage "employers to respond . . . by decreasing benefits under existing plans or slowing the rate of formation of new plans." H.R. Rep. No. 807, 93d Cong., 2d Sess. 15 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4682. This is a realistic concern, since "[n]othing in ERISA requires employees to establish employee benefit plans" or "mandates what kind of benefits employers must provide, if they choose to provide such a plan." *Lockheed Corp. v. Spink,* 517 U.S. 882, 887 (1996); *accord, Alessi v. Raybestos-Manhatton, Inc.,* 451 U.S. 504, 510-11 (1981). ERISA's statutory scheme reflects Congress's recognition of "the public interest in encouraging the formation of employee benefit plans." *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 54 (1987).

No one can dispute that litigation is a costly undertaking, and ERISA cases are no exception. Claims alleging breach of fiduciary duty are particularly burdensome, to plaintiffs and defendants alike. For example, fiduciary self-dealing claims are fact-intensive, and the prudence of a fiduciary's conduct—its reasonableness in the circumstances—often presents a triable issue of fact. *See* ERISA § 404, 29 U.S.C. § 1104; *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir. 1983). It is not uncommon for thousands of pages of documents to be reviewed and produced and scores of depositions taken. Experts and counter-experts are typically retained to evaluate the prudence of fiduciaries' investment decisions and assess damages. *See, e.g., Herman v. Mercantile Bank, N.A.*, 143 F.3d 419, 421 (8th Cir. 1998) (referring to expert testimony as to the value of stock purchased on behalf of a pension plan); *Reich v. Walter W. King Plumbing & Heating Contractor, Inc.*, 98 F.3d 147, 150 (4th Cir. 1996) (noting that four expert witnesses testified at trial).

Fiduciary targets in these actions include banks, insurance companies, and consulting firms, in addition to plan sponsors and their agents. The brunt of the burden, however, is often borne by the sponsors. Not only are sponsors frequently fiduciaries with respect to their plans, at least for some purposes, but it is common for the sponsoring employer to indemnify its officers, directors, and employees who serve their plans, as well as outside service providers.[3] Thus, the financial burden of fiduciary litigation often falls disproportionately on the sponsor.

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[3] Indeed, ERISA expressly contemplates such arrangements. ERISA § 410(b)(3), 29 U.S.C. § 1110(b)(3) (employers may "purchas[e] insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan"); 29 C.F.R. § 2509.75-4 (permitting indemnification of fiduciaries by plan sponsor).

The decision below, if allowed to stand, will necessarily prolong § 502(a)(2) litigation commenced by private parties.[4] Given the threat of a subsequent action by the Department of Labor, such cases could not be settled, for practical reasons, at any time before the statute of limitations expired on the Secretary's claims. Defendants obviously have little incentive to contribute towards a settlement when they cannot obtain an effective release, and even where they do, their contributions will be less than they might otherwise pay to achieve true finality. This impediment to settlement thus operates to the detriment of our judicial system and employee benefit plans and their participants. Court's dockets will be unduly congested with pending cases that otherwise would be settled. And the inevitable delay in providing any recovery to the plan would, of course, prejudice employee benefit plans and their participants, many of whom, in the case of pension plans, are elderly.

In addition, under the decision below, plan sponsors, fiduciaries, and service providers are placed in an untenable position. Neither settlement nor final judgment guarantees repose. Even apart from the significant costs involved, exposing plan sponsors and fiduciaries to the threat of multiple and possible conflicting judgments inevitably would discourage the creation and maintenance of employee benefit plans.

B. ERISA Litigation, Along With Its Attendant Costs to Employee Benefit Plan Community, Is Increasing

There is no doubt that litigation involving employee benefit plans is on the rise. For example, a simple search of the WESTLAW database indicates that this Court de-

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[4] The overwhelmingly majority of civil ERISA cases are brought by private parties and not the Secretary of Labor. *See* Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts 1997*, Table C-2 (only 141 of the 10,045 ERISA cases filed in fiscal 1997 were brought by the government).

cided 18 ERISA cases between ERISA's enactment in 1974 and the end of 1989. From 1990 to the present, on the other hand, the Court has handed down no less than 29 such decisions. This trend is even more evident in the courts of appeals, which issued only 412 ERISA decisions before 1990 but approximately 1,680 such decisions in the nine years since. The Administrative Office of the U.S. Courts reports that the number of ERISA civil cases filed increased by 4 percent from fiscal 1996 to fiscal 1997, with more than 10,000 such suits being initiated in fiscal 1997 alone. *Judicial Business of the United States Courts 1997,* Table C-2A.

Nor is there any reason to believe that the volume of ERISA litigation will do anything but continue to grow. Some of the many ERISA cases decided by this Court in the past few years seem destined to provide fertile ground for developing new theories of liability that can be asserted against plan sponsors, fiduciaries, and service providers. Indeed, the impact of these decisions is already being felt in the lower courts.

For example, in *Varity Corp. v. Howe,* 516 U.S. 489 (1996), this Court held that individual plan participants suing on their own behalf, can bring an action seeking equitable relief for breach of fiduciary duty. Such claims are actionable under § 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), which allows participants, beneficiaries, and fiduciaries to seek equitable relief to redress statutory violations. Relying on the reasoning of *Russell,* some courts of appeals had held that no such action lies, since claims for breach of fiduciary duty are specifically addressed in § 502(a)(2) of the statute. *See, e.g., Kayes v. Pacific Lumber Co.,* 51 F.3d 1449 (9th Cir.), *cert. denied,* 116 S. Ct. 301 (1995).

The Court's decision in *Varity* thus cleared the way for a significant increase in the incidence of participant claims for breach of fiduciary duty. Like *Varity* itself, these cases often involve allegations of employer misrepresentations to

plan participants. *See, e.g., Farr v. U.S. West, Inc.*, 151 F.3d 908 (9th Cir. 1998); *Pocchia v Nynex Corp.*, 81 F.3d 275 (2d Cir. 1996). Such claims are inherently fact-specific and often do not lend themselves to summary disposition. For this reason, they impose a heavy burden on plan sponsors.

It is reasonable to expect that these and a host of other frequently-litigated issues will continue to occupy litigants and the courts for years to come. *Varity* claims are unlike this case in that they do not involve claims for monetary damages. But they nevertheless impose a substantial and increasing burden on plan sponsors. And the decision below, which all but guarantees an end to prompt settlement of private § 502(a)(2) fiduciary claims, threatens even greater harm. There is no justification for this result since, as explained in the next section, ERISA itself protects the competing interests of the Secretary of Labor in enforcing the statute, on which the court of appeals relied.

C. The Statutory Scheme Adequately Protects the Interests of the Secretary and the Public

Contrary to the court of appeals' suggestion, Pet. App. at 17a-19a, the ruling below is not necessary to protect the role of the Secretary in enforcing ERISA. Apart from her unfettered right to intervene in private litigation, the Secretary not only may bring an action for fiduciary breach against those who cause a plan to enter into an inadequate settlement, but also may pursue injunctive and declaratory remedies. There is no reason, then, for the Secretary's enforcement role to interfere with the expectations of private litigants. And there is no reason to jettison accepted common law principles of *res judicata* and release.

ERISA itself reconciles the policies favoring settlement and finality with the enforcement responsibility of the Secretary. The Secretary shares an equal right with private

parties to bring an action to enforce ERISA's fiduciary rules. ERISA § 502(a)(2), 502(a)(3), 502(a)(5), 29 U.S.C. § 1132(a)(2), 1132(a)(3), 1132 (a)(5). Under these provisions, a plan's participants, beneficiaries, fiduciaries, and the Secretary of Labor are all authorized to sue for breach of fiduciary duty and for other violations of the statute.

The Secretary, however, also has a right not given to private litigants. The Secretary "shall have the right to intervene in any action" brought by a private litigant. ERISA § 502(h), 29 U.S.C. § 1132(h). And she is assured a meaningful opportunity to exercise her right of intervention because any private party—a participant, beneficiary, or fiduciary—that brings an action for these fiduciary breach and statutory violations must serve a copy of the complaint on the Secretary. ERISA § 502(h), 29 U.S.C. § 1132(h). *Id.*

By statute, then, the Secretary must be notified of pending litigation and given the opportunity to participate as a party. Should it appear to the Secretary that the plan's interests might not be adequately protected by the private plaintiffs, she has only to take advantage of her statutory right of intervention. Having the status of a party, the Secretary could then participate fully in the court's evaluation of any proposed settlement, and she could appeal from a district court approval of a settlement which she finds inadequate.

Under the decision below, however, the Secretary's right to bring § 502(a)(2) claims is superior to that of private parties in a way that is *not* provided for in the statutory scheme. ERISA's civil enforcement scheme was designed to give participants and beneficiaries "ready access to the federal courts." ERISA § 2(b), 29 U.S.C. § 1001(b). Surely, the privilege of settling disputes on the terms they find acceptable is assumed to accompany the right to bring the action in the first place. Nothing in statutory scheme gives the Secretary effective veto power over private settle-

ments; nor should she be permitted to exercise such a power indirectly by bringing a duplicative action.

In any event, the Secretary has an entirely different remedy for any perceived inadequacies in the monetary recovery awarded in private settlements, other than relitigating previously settled claims. Under ERISA, a pension plan's fiduciaries are responsible for protecting the plan's interests. When a pension plan enters into a settlement, its fiduciaries must discharge their statutory responsibilities, including the duties to act prudently and solely in the interest of the plan's participants and beneficiaries. ERISA § 404(a), 29 U.S.C. § 1109(a); *see Central States Pension Fund v. Central Transp.*, 472 U.S. 559, 571 (1985) ("ERISA clearly assumes that trustees will act to ensure that a plan receives all funds to which it is entitled."). If the Secretary believes a fiduciary violated these duties by accepting, on the plan's behalf, a settlement that provided too little in the way of a monetary recovery, her remedy is to bring a separate action against the fiduciary under §§ 409 and 502(a)(2) of ERISA.

Even if such an action were brought against a party who was a defendant in the settled action, it would challenge different conduct and thus would not be the same claim. In such an action, the Secretary, if successful, could recover from the breaching fiduciaries the difference between the amount the plan should have received and the amount awarded to the plan by the settlement. At the same time, the parties charged with fiduciary breach in the settled action would be protected by the common law's finality rules.

The only remaining interests that the Secretary asserted below are her interests in shaping the development of the law in this area and in deterring and preventing future violations, which interest is widely recognized. *See, e.g., Cunningham*, 716 F.2d at 1462 (Secretary's interest in preventing wrongdoers from causing losses to any future participant is "entirely separate and distinct from that of

a private litigant"). However, overturning the judgment below would in no way interfere with the Secretary's ability to perform this role, given her continued right to seek injunctive and declaratory relief.[5]

These mechanisms fully protect the Secretary's enforcement interest. She can shape the law of ERISA fiduciary responsibility by, for example, convincing a court that certain conduct is unlawful and obtaining an injunction against its repetition. The precedent set thereby would serve as notice to the employee benefit plan community of the state of the law to the same extent as would a money judgment. The courts need not override the common law's finality rules, which form a part of the backdrop on which Congress legislates, *see Astoria Federal Savings & Loan Ass'n v. Solimino,* 501 U.S. 104, 106-110 (1991), by permitting the Secretary to obtain multiple monetary recoveries.

Nor does § 502(1), calling for the assessment of a civil penalty on monetary recoveries obtained by judgment or settlement of actions initiated by the Secretary, change the analysis. By its terms, § 502(1) requires the imposition of the civil penalty only where the Secretary obtains monetary relief for a plan through litigation which the Secretary has initiated or pursuant to a settlement with the Department of Labor. She has no authority to impose the penalty in the abstract; her authority to do so is tied to her recovery of monies for the plan on a viable claim for relief. If, for example, the plan's losses were completely recovered in a private settlement, no penalty could be imposed regardless of any additional deterrent effect the penalty might have. By the same token, there is no basis for imposing the penalty where the underlying claim already has been extinguished by *res judicata* and release. In either case, the underlying predicate for the civil penalty's imposition no longer exists.

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[5] Indeed, in this case the Secretary did obtain injunctive relief against SCNB in a negotiated settlement. *See* Pet. at 13.

There is, in short, no justification for allowing the Secretary to upset private settlements and no reason to cast aside fundamental principles of jurisprudence to protect the Secretary's enforcement role.

CONCLUSION

For the reasons stated above and in the Petition, the Court should grant the petition and issue a writ of certiorari to review the decision of the court of appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1998

WILLIAM A. FICKLING, JR., ET AL.,
PETITIONERS

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

SOUTH CAROLINA NATIONAL BANK,
PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether res judicata bars a suit by the Secretary of Labor under Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a) (1994 & Supp. II 1996), insofar as the Secretary seeks monetary relief against defendants who have previously settled ERISA claims brought against them by private parties.

2. Whether Section 502(a)(5) of ERISA, 29 U.S.C. 1132(a)(5), authorizes an action by the Secretary for equitable relief against parties in interest who have engaged in a transaction prohibited by Section 406(a) of ERISA, 29 U.S.C. 1106(a).

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-758

WILLIAM A. FICKLING, JR., ET AL.,
PETITIONERS

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

No. 98-762

SOUTH CAROLINA NATIONAL BANK,
PETITIONER

v.

ALEXIS M. HERMAN, SECRETARY OF LABOR

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (98-758 Pet. App. 1a-30a; 98-762 Pet. App. 1a-28a) is reported at 140 F.3d 1413. The orders of the district court granting partial summary judgment to the petitioners in No. 98-758 (98-758 Pet. App. 35a-37a) and dismissing the Secretary's claims for monetary relief against the petitioner in No. 98-762 (98-758 Pet. App. 38a-50a; 98-762 Pet. App. 29a-39a, 43a-45a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 15, 1998, and a petition for rehearing was denied on August 10, 1998 (98-758 Pet. App. 31a-34a; 98-762 Pet. App. 40a-42a). The petition for a writ of certiorari in No. 98-758 was filed on November 9, 1998 (a Monday), and the petition in No. 98-762 was filed on November 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The petitioner in No. 98-762, South Carolina National Bank (SCNB), was the trustee of an employee stock ownership plan (ESOP) created by the Charter Medical Corporation (Charter). 98-758 Pet. App. 3a.[1] As such, SCNB was a fiduciary under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.* Among other things, ERISA requires a fiduciary to exercise its responsibilities solely in the interest of the plan's participants and beneficiaries, for the exclusive purposes of administering the plan and providing benefits, and with a high degree of prudence. 29 U.S.C. 1104(a)(1)(A) and (B).

A plan fiduciary also must not cause the plan to engage in certain "prohibited transactions," including (with some exceptions) a sale or exchange of property involving, or a transfer or use of plan assets to or for the benefit of, a "party in interest." 29 U.S.C. 1106(a)(1)(A) and (D). The petitioners in No. 98-758 include William A. Fickling, Jr., the President and Chairman of the Board of Directors at Charter, and some of his relatives and related entities (the Fick-

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[1] Unless otherwise indicated, all appendix references are to the appendix in No. 98-758.

lings), who at relevant times were parties in interest under 29 U.S.C. 1002(14) with respect to the Charter ESOP. Pet. App. 3a, 8a n.9.[2]

In February 1990, SCNB paid $80 million from plan assets to the Ficklings for stock in Charter, a closely held corporation. Pet. App. 3a. Under ERISA, that purchase was exempted from the "prohibited transaction" rules of 29 U.S.C. 1106 if, but only if, it met certain statutory conditions, including that it be for "adequate consideration." 29 U.S.C. 1108(e); see Pet. App. 9a n.10, 24a n.20. As trustee of the plan, SCNB was responsible for determining the value of the stock to be received in the transaction, which was not publicly traded and had no established market price. See *id.* at 3a n.2. After a subsequent investigation, see 29 U.S.C. 1134, the Secretary of Labor determined that SCNB had improperly evaluated the effect of more than $1.5 billion in corporate debt on the value of Charter's stock, and that a reasonable investigation by SCNB would have disclosed that the stock was essentially worthless. See Pet. App. 3a n.2, 4a. Charter later filed for bankruptcy. See *id.* at 54a; 98-758 Pet. 3.

2. While the Secretary was investigating the 1990 transaction, participants and beneficiaries of the ESOP brought a class action against Charter, a number of the Ficklings, SCNB, and others (the *Knop* action). Pet. App. 4a. That suit alleged violations of ERISA, federal securities laws, and state law in the February 1990 stock purchase and in a similar $375 million purchase in

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[2] It is undisputed that Mr. Fickling is a party in interest, and the court of appeals assumed for purposes of its decision that the other Fickling petitioners were as well. The court of appeals directed the district court, on remand, to allow the parties to complete discovery on that issue. Pet. App. 8a n.9, 29a n.26.

1988. *Ibid.* In March 1992, the Secretary, who was not a party to the *Knop* action, learned that the private litigants were settling with all defendants. *Ibid.* The Secretary informed the parties to the *Knop* action that she was conducting an investigation, that she might bring suit, and that she would not be bound by any private settlement in *Knop*. *Ibid.* On April 6, 1992, the Secretary received fully executed settlement documents entered into by the parties to the *Knop* action. *Id.* at 4a, 60a. On April 9, 1992, the Secretary restated her position in a letter to counsel for all the private litigants:

> We have also been informed that the parties to the *Knop Action* may have the understanding that the Secretary can, may, or will be bound in some way by the terms of any settlement entered into in the *Knop Action*. Such an understanding is unfounded.
>
> The Secretary was not a party to the settlement and will not be bound by any part of the settlement; in fact, the Secretary is continuing her investigation of the Charter [ESOP] regarding possible violations of [ERISA].
>
> In the event the Department concludes that ERISA violations occurred, you should be aware that we will take whatever enforcement action, including litigation, which we deem to be appropriate. While we do not wish to make the chances of settling the *Knop Action* any less likely, we feel that it would be disingenuous to allow it to go forward without making the above clear to the parties to such settlement.

Id. at 60a. None of the parties to the *Knop* action sought to join the Secretary as an additional party. *Id.* at 4a.[3]

On April 30, 1992, counsel in *Knop* informed the district court that the Secretary "had no desire to impede the proposed settlement but that [her] silence should not be taken as restricting whatever [she] might do in the future." Pet. App. 5a. The district court then approved the settlement of the class action, contingent upon confirmation by the bankruptcy court of a plan of reorganization for Charter. *Id.* at 51a-55a. Under the settlement, claims against all defendants, including the Ficklings and SCNB, were dismissed with prejudice. *Id.* at 5a, 54a. In return, Charter provided certain benefits to the ESOP and its participants and beneficiaries, primarily $12.3 million paid into a new retirement plan established as a subplan of the ESOP. *Id.* at 5a, 42a-43a. The Ficklings and SCNB did not contribute any cash to the settlement. *Id.* at 5a.[4]

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[3] The Ficklings state that the Secretary was "kept informed" concerning the *Knop* proceedings and offered "no further dissent" after one settlement proposal she viewed as inadequate was "substantially sweetened." 98-758 Pet. 3. The Secretary had expressed an opinion only as to recovery from Charter itself in bankruptcy proceedings, not as to the appropriate liability of any of the parties the Secretary is suing here. R17-169 at 10, 50. The Ficklings also repeat (98-758 Pet. 6) the district court's inaccurate assertion (Pet. App. 45a) that the Secretary "concedes" that she received "all of the information and documents upon which [her] present claims are based" before the district court's April 30, 1992, hearing on the *Knop* settlement. The Secretary made no such concession in the district court, and the court of appeals relied on other grounds in rejecting the district court's ruling with respect to laches. Pet. App. 27a-29a, 45a-46a.

[4] The Ficklings suggest that they gave up valuable rights as part of the settlement. 98-758 Pet. 4 n.3. As the court of appeals

In June 1992, the Secretary informed petitioners' attorneys that, although her investigation had not concluded, she had determined that the 1990 stock purchase violated ERISA. R19-1, Exh. A; see Pet. App. 43a. She outlined the relief she sought, and asked petitioners to discuss the matter with a view to resolving it through a consent order. R19-1, Exh. A. SCNB responded by filing both a third-party complaint against the Secretary in the *Knop* action and a separate action for declaratory relief, in each case alleging that the *Knop* settlement barred the Secretary from obtaining additional relief. Pet. App. 5a.

On July 24, 1992, the Secretary filed her own action against petitioners, alleging that SCNB had transferred $80 million in plan assets to the Ficklings in exchange for essentially worthless stock, in violation of Sections 404(a)(1)(A) and (B) and 406(a)(1)(A) and (D) of ERISA, 29 U.S.C. 1104(a)(1)(A) and (B), 1106(a)(1)(A) and (D). See Pet. App. 3a, 6a. The Secretary sought damages from SCNB and disgorgement of the $80 million paid to the Ficklings in the 1990 transaction (both subject to being offset by sums recovered in the *Knop* litigation) and injunctive relief, pursuant to Sections 502(a)(2) and (5) of ERISA, 29 U.S.C. 1132(a)(2) and (a)(5). Pet. App. 6a; see also ERISA § 502(*l*), 29 U.S.C. 1132(*l*) (civil penalties).[5] The Secretary's suit was later consolidated

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noted (Pet. App. 5a n.4), the Secretary believes that the reverse is true, and that in any event any contribution from the Ficklings was of negligible value.

[5] Section 1132(a)(2) allows a civil action "by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under" 29 U.S.C. 1109. Section 1109 makes a fiduciary personally liable for, among other things, plan losses resulting from breaches of fiduciary duty. The Secretary's claim for monetary relief against SCNB is based on those provisions. The Secretary's claims

with SCNB's two actions against the Secretary. Pet. App. 6a.

3. In June 1993, the district court granted summary judgment to the Ficklings on the Secretary's disgorgement claim, without analysis other than a citation to *Useden* v. *Acker*, 947 F.2d 1563 (11th Cir. 1991), cert. denied, 508 U.S. 959 (1993). Pet. App. 35a-37a. *Useden* held that 29 U.S.C. 1109(a) and 29 U.S.C. 1132(a) (1994 & Supp. 1996) do not create a cause of action for money damages against a non-fiduciary for participation in a fiduciary breach. 947 F.2d at 1582.

In November 1996, the district court granted a further partial summary judgment to SCNB, denying the Secretary's claim for monetary relief against SCNB. Pet. App. 38a-50a. The court held that its judgment implementing the *Knop* settlement precluded the Secretary's claim under Section 1132(a)(2), on the grounds that the Secretary's claim was the same as one asserted by the *Knop* plaintiffs, that there was "substantial identity of the parties" in the two cases (*id.* at 47a), and that the Secretary could have intervened in the *Knop* action under 29 U.S.C. 1132(h), but chose not to do so. Pet. App. 46a-50a. The court reserved judgment, however, on whether the Secretary could sue for

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for injunctive relief against SCNB and for restitution against the Ficklings are based on Section 1132(a)(5), which authorizes an action by the Secretary to enjoin violations or to obtain "other appropriate equitable relief" to redress violations or enforce the Act. Section 1132(*l*) requires the Secretary to assess civil penalties in cases involving breaches of duty or other violations by fiduciaries, or knowing participation in such a breach or violation by "any other person."

"appropriate equitable relief" under Section 1132(a)(5). *Id.* at 48a n.1.[6]

In January 1997, the Secretary settled her claims for injunctive relief against SCNB, after SCNB agreed never to serve as trustee for the Charter ESOP and not to serve as a trustee for any ESOP for three years. See Pet. App. 7a & n.7. The district court then entered final judgment, and the Secretary appealed. *Id.* at 7a; 98-762 Pet. App. 46a-47a.

4. The court of appeals reversed in part, vacated in part, and remanded. Pet. App. 1a-30a. The court first held that the Secretary could sue the Ficklings, as parties in interest, for equitable relief under Section 1132(a)(5), including disgorgement of profits from the 1990 stock transaction. *Id.* at 9a-17a. The court relied (*id.* at 14a-17a & n.14) on its earlier decision in *Useden*, on the holdings of other courts of appeals, and on portions of this Court's opinions in *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 889 n.3 (1996), and *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 253-254, 262 (1993).

The court also held that the private settlement in *Knop* did not bar the Secretary's separate action. Pet. App. 17a-27a. Noting that Section 1132(a) gives the Secretary "an independent and unqualified right to sue and seek redress for ERISA violations because ERISA plans significantly affect the 'national public interest,'" the court explained that, unlike private litigants, the Secretary sues:

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[6] The court also held that the Secretary's suit was barred by laches and by a release of claims included in the *Knop* settlement. Pet. App. 45a-46a, 48a-49a. The court of appeals reversed those holdings, see *id.* at 20a n.17, 27a-29a, and petitioners do not renew them in this Court.

> not only to recoup plan losses, but also to supervise enforcement of ERISA, to guarantee uniform compliance with ERISA, to expose and deter plan asset mismanagement, to protect federal revenues, to safeguard the enormous amount of assets and investments funded by ERISA plans, and to assess civil penalties for ERISA violations.

Id. at 18a. After reviewing other cases that have held that the Secretary is not bound by prior private litigation when she files her own ERISA enforcement action (*id.* at 20a-22a), the court concluded that that result is "consistent with the well-established general principle that the government is not bound by private litigation when the government's action seeks to enforce a federal statute that implicates both public and private interests" (*id.* at 22a-23a). Applying that principle to ERISA, the court reasoned:

> The national public interest in deterrence of asset mismanagement suffers if private parties can release claims against ERISA violators for negligible financial recovery and thereby immunize plan trustees and 'parties in interest' from ERISA violations. Furthermore, the public treasury is ill-served by denying the Secretary the opportunity to assess civil penalties, expressly authorized by Congress to deter ERISA violations, as well as the occasion to ensure that the Plan receives full value for the millions of dollars in tax subsidies.

Id. at 26a.

The court of appeals rejected the district court's view that the Secretary must intervene in private litigation under Section 1132(h) in order to avoid preclusion of her own claims. Pet. App 26a-27a. The court concluded that the Act leaves the decision whether to

intervene to the discretion of the Secretary, and that, given the volume of ERISA cases the Department monitors, it would be "unreasonable and unwise to require the Secretary to intervene in every ERISA action or be precluded." *Ibid.* The court accordingly remanded the case for further proceedings on the merits of the Secretary's claims.

ARGUMENT

The decision below is correct and does not conflict with any decision of this Court or of any other court of appeals. The case, moreover, is in an interlocutory posture, because the court of appeals at this stage has merely remanded for consideration of the Secretary's claims on the merits. There is accordingly no reason for further review.

1. a. Petitioners argue that their settlement with plan participants in the *Knop* action precludes any claim by the Secretary for monetary relief. 98-758 Pet. 10-22; 98-762 Pet. 6-25. The general rule, however, is that a prior judgment binds only parties to the proceeding in which it was entered. See, *e.g.*, *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996). Although there is an exception to that rule "when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment," in this context "privity" is essentially a matter of identity of interests. *Ibid.* As the court of appeals recognized, no such identity generally exists between public and private plaintiffs "when the government's action seeks to enforce a federal statute that implicates both public and private interests." Pet. App. 22a-23a; see 18 C.A. Wright et al., *Federal Practice and Procedure* § 4458, at 520 & n.40 (1981) (citing *City of Richmond* v. *United States*, 422 U.S. 358, 373 n.6

(1975), and *Durfee* v. *Duke*, 375 U.S. 106, 115-116 (1963)); 18 J.W. Moore, *Moore's Federal Practice* § 131.40[3][e][ii][B], at 131-149 & n.89 (3d ed. 1998) (citing *Sam Fox Publ'g Co.* v. *United States*, 366 U.S. 683, 690 (1961)); see also *Mississippi* v. *Louisiana*, 506 U.S. 73, 78 (1992) (State not bound by private litigation to establish property boundaries).

The court of appeals correctly concluded that, although 29 U.S.C. 1132 (1994 & Supp. II 1996) authorizes suits both by the Secretary and by private parties, the Secretary represents national public interests that are separate and distinct from those of any private litigant. Pet. App. 18a-19a. In enacting ERISA, Congress found that plans like the Charter ESOP "are affected with a national public interest"; that they directly affect the well-being of millions of employees and their dependents and are important to the national economy; and that they substantially affect the revenues of the United States because they are afforded preferential tax treatment. 29 U.S.C. 1001(a); see 26 U.S.C. 401(a) (1994 & Supp. II 1996) (requirements for tax-qualified pension plans, including ESOPs), 404(a)(9) (1994 & Supp. II 1996) (deductibility of employer contributions to an ESOP), 501(a) (tax-exempt status for qualified plans). Accordingly, when the Secretary sues under ERISA, she seeks not only to recoup losses for a plan, but to further the government's interests in ensuring uniform compliance with ERISA, exposing and deterring plan asset mismanagement, protecting the integrity of the federal tax system, safeguarding the enormous amount of money held in and invested by ERISA plans, and assessing civil penalties in the circumstances intended by Congress. See Pet. App. 18a; compare *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 326 & n.8 (1980). Because private

litigants cannot adequately represent those governmental interests, they are not in "privity" with the Secretary, and the resolution of a private suit such as the *Knop* action cannot bar an independent action by the Secretary. *Id.* at 20a-26a; accord *Secretary of Labor* v. *Fitzsimmons*, 805 F.2d 682, 688-694 (7th Cir. 1986) (en banc).

b. Petitioners concede the lack of privity with respect to nonmonetary relief, such as the restrictions ultimately imposed, in settlement of the Secretary's suit, on SCNB's ability to serve as an ESOP fiduciary. They argue, however, that the public interests represented by the Secretary do not extend to any monetary relief that, although obtained by the Secretary's suit, would be paid to the plan. In that context, they contend, the Secretary has no broader interest than any private litigant who sues solely to vindicate the immediate monetary interests of the plan. See 98-758 Pet. 12-13; 98-762 Pet. 6, 8, 9-10.[7]

That contention is without merit. When the Secretary chooses to bring suit to remedy violations of ERISA, her interests in obtaining any and all relief authorized by the Act are independent of, and transcend, the interests of any private party, including those of the particular plan or plans to which all or part of a monetary recovery might be paid. That result does not change simply because *some* of the Secretary's

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[7] SCNB appears to concede that the Secretary has independent authority to proceed under 29 U.S.C. 1132(a)(5); it argues only that the Secretary cannot proceed against it under Section 1132(a)(2) because the *Knop* action involved, among other things, a private claim under that Section. See 98-762 Pet. 16-17. The Fickling petitioners, who have been sued under Section 1132(a)(5), argue more broadly that the Secretary cannot obtain monetary relief under either provision. See 98-758 Pet. 10-16, 22-28.

interests may coincide with those of an injured plan or its participants or beneficiaries. See *Fitzsimmons*, 805 F.2d at 691-692 n.12; cf. *General Telphone*, 446 U.S. at 326 ("When the EEOC acts [by bringing a suit seeking both injunctive relief and backpay], albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination.").[8]

Moreover, and quite concretely, a suit by the Secretary for monetary relief seeks not only to recoup losses or to secure equitable monetary relief on behalf of the plan, but also to provide the basis for assessing the civil penalties required by 29 U.S.C. 1132(*l*), which Congress has determined are necessary to deter ERISA violations and to enhance the legal protection of all plan participants and beneficiaries. See H.R. Conf. Rep. No. 386, 101st Cong., 1st Sess. 432-433 (1989). Those penalties, which are payable to the United States, are calculated as a percentage of any amount recovered in a suit by the Secretary, and there is no comparable provision for penalties based on awards in private suits. Thus, even with respect to monetary relief that is itself payable only to a particular plan, an action by the Secretary is never *solely* representative of the financial interests of that plan or its participants or beneficiaries.[9]

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[8] Of course, the fact that different plaintiffs have different interests should not lead to double recovery. The Secretary has always contemplated that any monetary relief ordered as a result of her suit and payable to the Charter ESOP would be offset by amounts paid to the plan as a result of the *Knop* action. Compare *General Telephone*, 446 U.S. at 330.

[9] As petitioners note (98-762 Pet. 3-4; see 98-758 Pet. 12), the Secretary argued during investigation and discovery related to the Charter ESOP that SCNB was required to produce certain docu-

For the same reasons, SCNB errs in relying (98-762 Pet. 9-10, 13-16) on this Court's decision in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985). *Russell* held (*id.* at 138) that a fiduciary may not be held liable for compensatory or punitive damages in an action by a participant under 29 U.S.C. 1109(a) and 1132(a)(2). The Court reasoned that the Act's detailed provisions for securing relief that inures to the benefit of the plan as a whole indicate that Congress did not intend to authorize the award of extracontractual damages to particular participants. 473 U.S. at 139-148. It was in that context that the Court noted, as SCNB points out (98-762 Pet. 16), that "[i]nclusion of the Secretary of Labor [as an authorized plaintiff under Section 1132(a)(2)] is indicative of Congress' intent that actions for breach of fiduciary duty be brought in a representative capacity on behalf of the plan as a whole." 473 U.S. at 142 n.9. That observation accurately reflects the fact that when the Secretary litigates under ERISA she acts in the interests of plans and all their participants and beneficiaries, not on behalf of particular individuals who may have been specially injured by a violation of the Act. It does not, however, suggest that the Secretary's interest in ERISA enforcement litigation is limited to

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ments because a trustee has no privilege to withhold documents from plan participants or beneficiaries, see, *e.g.*, *Wildbur* v. *Arco Chem. Co.*, 974 F.2d 631, 645 (5th Cir. 1992), and the Secretary was acting on behalf of and in the interests of participants and beneficiaries in her investigation. The Secretary never contended, however, that her interests were limited to those of participants and beneficiaries, or that her interests would always coincide with theirs. See also *Fitzsimmons*, 805 F.2d at 697 n.18 (rejecting similar res judicata argument based on the Secretary's position in discovery).

obtaining relief for plans, or that she sues, under the Act, only in some narrow representative capacity analogous to that of the named plaintiff in a private class action. See *Fitzsimmons*, 805 F.2d at 691-692 n.12; cf. *General Telephone*, 446 U.S. at 326, 332-333.

Similarly, petitioners err in arguing (see 98-758 Pet. 10-13; 98-762 Pet. 6, 8, 10-11) that the court of appeals' decision departs from principles of res judicata that this Court has recognized in other cases, primarily *Heckman* v. *United States*, 224 U.S. 413 (1912), and *Chicago, Rock Island & Pacific Railway* v. *Schendel*, 270 U.S. 611 (1926). *Heckman* held in part that individual Indian recipients of federal allotments of tribal land were not necessary parties to a suit by the United States to set aside conveyances made in violation of the federal law governing the allotments, and that the decree in such a suit would nonetheless bind the Indian allottees. 224 U.S. at 444-447. That conclusion was based in large part on the federal government's unique trust relationship with the Indians, "the plenary control of Congress in legislating for the protection of the Indians under its care," and the details of the particular federal statutory scheme involved—matters that find little analogue in the ERISA context. *Id.* at 444-445; see *id.* at 444-446 (citing cases involving binding effect on beneficiaries of suits by or against trustees); see also, *e.g.*, *id.* at 442 (relying on the United States' "interest springing from its peculiar relations to the Indians and the [relevant historical] course of dealing"). There is no similar relationship of trusteeship, guardianship, or dependency between the Secretary and the private litigants who are authorized to sue under 29 U.S.C. 1132(a) (1994 & Supp. II 1996). And even if *Heckman* could be read to support preclusion of *private* ERISA litigation on the basis of a prior suit by the *Secretary* (a reading we do

not suggest), it surely would not support the converse argument—*i.e.*, that litigation by interested private parties could ever take the place of suit by the public "trustee." See 224 U.S. at 445 (Indians were "precluded from taking any position in the legal proceedings instituted by the Government * * * which would render such proceedings ineffectual or give support to the prohibited acts. * * * [T]hey could not compromise [the claim]; nor could they assume any attitude with respect to their interest which would derogate from its complete representation by the United States. This is involved necessarily in the conclusion that the United States is entitled to sue, and in the nature and purpose of the suit.").

Petitioners' reliance on *Schendel* is likewise unavailing. That case involved the preclusive effect of a worker's compensation judgment in one case, in which the employee's widow was a party, in a second case brought "in the name of [a] personal representative, for the sole benefit of the widow." 270 U.S. at 617. In discussing the applicable principles of res judicata, the Court described with apparent approval a lower-court decision in which "a suit in the name of the government was brought to enforce the right of a private party, [and] it was held that a prior adverse adjudication by a state court in a suit against him personally, determining the same issues, was available as an estoppel against the government." *Id.* at 619, discussing *United States* v. *Des Moines Valley R.R.*, 84 F. 40 (8th Cir. 1897). The clear premise of the Court's discussion in *Schendel*, however, was that the nominal plaintiff in the second suit at issue—like the government in *Des Moines Valley*—had "statutory authority * * * to sue, not in his own right or for his own benefit or that of the estate, but in the right and for the sole benefit of the

widow." 270 U.S. at 620; see also *id.* at 619 (government sued "for the sole benefit of [a private party]," and as "a merely nominal plaintiff" (quoting *Des Moines Valley R.R.*, 84 F. at 44, 45)); *id.* at 620-622 (discussing other cases).[10] Reference to *Schendel* thus begs the question in this case, which is whether the Secretary represents *more* than merely private interests whenever she brings an enforcement action under ERISA. The court of appeals correctly determined that she does.

c. The court of appeals' decision in this case is consistent with the decisions of all other courts of appeals that have considered the preclusive effect of private litigation on an action by the Secretary under ERISA. See *Beck* v. *Levering*, 947 F.2d 639, 642 (2d Cir. 1991), cert. denied, 504 U.S. 909 (1992); *Fitzsimmons*, 805 F.2d at 688-694; *Donovan* v. *Cunningham*, 716 F.2d 1455, 1462-1463 (5th Cir. 1983), cert. denied, 467 U.S. 1251 (1984). Two of those courts have expressly recognized that res judicata does not prevent the Secretary from obtaining monetary relief in a subsequent action. See *Beck*, 947 F.2d at 642 (argument that res judicata bars the Secretary is "frivolous"); *Fitzsimmons*, 805 F.2d at 692-694 (Secretary not bound by res judicata), 696 (Secretary sought both injunctive relief and money lost through trustees' mismanagement); cf. *Cunningham*, 716 F.2d at 1462-1463 n.10 (district court to consider scope of relief on remand).[11]

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[10] *Des Moines Valley* itself expressly recognized that a claim by the government would not be precluded if the government "had a substantial interest in the controversy." 84 F. at 45.

[11] SCNB recognizes the precedential force of *Fitzsimmons*, but argues that it was wrongly decided. 98-762 Pet. 21-23. The Ficklings contend incorrectly that *Fitzsimmons* involved only claims for injunctive relief. 98-758 Pet. 16-17 n.11. The district

Petitioners err in contending that the decision below conflicts with appellate decisions that have applied claim preclusion principles under other statutes. 98-758 Pet. 13-16; 98-762 Pet. 11-12. Most of the cases petitioners cite hold or suggest that, while private litigation will not bar actions by the Equal Employment Opportunity Commission (EEOC) for injunctive relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 621 *et seq.*, it can bar the EEOC from obtaining back pay for individuals who resolved their back pay claims in earlier litigation. See, *e.g.*, *EEOC* v. *Kidder, Peabody & Co.*, 156 F.3d 298, 301-302 (2d Cir. 1998) (ADEA); *EEOC* v. *Harris Chernin, Inc.*, 10 F.3d 1286, 1289-1293 (7th Cir. 1993) (ADEA and Title VII); *EEOC* v. *United States Steel Corp.*, 921 F.2d 489, 493-497 (3d Cir. 1990) (ADEA); *EEOC* v. *Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987) (ADEA); *EEOC* v. *Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-1543 (9th Cir. 1987) (Title VII). Even if those decisions are correct, however, the court below properly recognized that petitioners' argument

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courts have also uniformly held that the Secretary and private litigants are not in "privity" for these purposes. See *Mason Tenders Dist. Council Pension Fund* v. *Messera*, 958 F. Supp. 869, 885 (S.D.N.Y. 1997); *Jackson* v. *Truck Drivers' Union Local 42 Health & Welfare Fund*, 933 F. Supp. 1124, 1132 n.9 (D. Mass. 1996); *Picardi* v. *Chicago Truck Drivers*, 581 F. Supp. 794, 797 (N.D. Ill. 1983). Lower courts have also reached similar conclusions with regard to federal securities and fair-housing litigation. See *SEC* v. *Egan*, 856 F. Supp. 401, 402 (N.D. Ill. 1993); *SEC* v. *Penn Cent. Co.*, 425 F. Supp. 593, 599 (E.D. Pa. 1976); *Tellurian U.C.A.N., Inc.* v. *Goodrich*, 504 N.W.2d 342, 345 (Wis. Ct. App. 1993).

"ignores the different statutory enforcement schemes of Title VII and the ADEA." Pet. App. 25a n.22.

Title VII and the ADEA require individuals to file charges with the EEOC, which must then investigate and attempt to eliminate statutory violations by conference, conciliation, and persuasion. See 29 U.S.C. 626(d); 42 U.S.C. 2000e-5(b), (e) and (f). Private litigants cannot sue until the EEOC issues a right to sue letter under Title VII, and cannot sue at all under the ADEA if the EEOC chooses to sue with respect to their claim. 29 U.S.C. 626(c)(1); 42 U.S.C. 2000e-5(b). In contrast, ERISA gives participants, beneficiaries, fiduciaries, and the Secretary entirely independent authority to bring suit, and nothing in ERISA requires private litigants to present claims to the Secretary, vests conciliation authority in the Secretary, or otherwise limits a private litigant's ability to bring (or compromise) a court action. See 29 U.S.C. 1132 (1994 & Supp. II 1996).

We may assume for present purposes that the protection for broader public interests that is afforded by the EEOC's mandatory pre-litigation involvement, and its large degree of control over the initiation of private litigation, may justify according such litigation some limited preclusive effect with respect to later public suits. But see *General Telephone*, 446 U.S. at 332 (actions by EEOC need not comply with class-action requirements; "We are sensitive to the importance of the res judicata aspects of Rule 23 judgments, but we are not free to depart from what we believe the statutory design to be.") However that may be, under ERISA the public interest is protected primarily by the Secretary's right to sue (or, at her option, to intervene in private litigation); and her enforcement of ERISA must not be prejudiced by the

actions of private litigants who are unaccountable to the Secretary or to the public interests that she represents.[12]

d. Contrary to petitioners' arguments (98-758 Pet. 21-22; 98-762 Pet. 24-25) the decision below will not disrupt the "sound administration of justice" by interfering with private settlements under ERISA. Individuals who are responsible for ERISA violations have known at least since the Seventh Circuit's 1986 decision in *Fitzsimmons* that a settlement with private litigants will not preclude a suit by the Secretary. They also continue to be subject to injunctive relief in actions brought by the Secretary (as petitioners concede), and to possible criminal sanctions for willful violations of ERISA. See 18 U.S.C. 664, 1001 (Supp. II 1996), 1027; 29 U.S.C. 1131; *Martin* v. *Rutledge*, 807 F. Supp. 693, 697 (N.D. Ala. 1992) (requiring restitution of plan losses, following a criminal conviction, pursuant to 18 U.S.C. 3663(e)(2)), aff'd, 996 F.2d 1232 (11th Cir. 1993)

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[12] None of the other allegedly conflicting appellate cases cited by petitioners (see 98-758 Pet. 14-15; 98-762 Pet. 11-12) bears any reasonable relation to the Secretary's prosecution of an ERISA action, pursuant to an independent grant of litigation authority, but without any right to bar or control prior private suits. See *In re Schimmels*, 127 F.3d 875, 877 n.1, 881-884 (9th Cir. 1997) (government precluded by qui tam action under False Claims Act, under which a private litigant sues on behalf of the government if the government declines to do so, see 31 U.S.C. 3730(b)); *In re Imperial Corp.*, 92 F.3d 1503, 1509 (9th Cir. 1996) (Federal Deposit Insurance Corporation, suing in its capacity as a receiver, does not sue as the United States, but stands in the shoes of an insolvent private institution); *NLRB* v. *Donna-Lee Sportswear Co.*, 836 F.2d 31, 34-37 (1st Cir. 1987) (National Labor Relations Board precluded, under particular facts, from finding that a contract exists when a district court held in a previous suit by a union that no contract existed).

(Table), cert. denied, 510 U.S. 1191 (1994). In any event, the greater threat to the "sound administration of justice" is the position advocated by petitioners, which would allow private litigants to settle claims involving serious ERISA violations in a way that affords affected plans a minimal recovery of their losses, immunizes wrongdoers from liability even if they themselves contribute little or nothing of value to the settlement, and gives no consideration to the public interests in safeguarding the stability of tax-subsidized pension funds, ensuring that the government receives full value for those subsidies, and allowing the Secretary to assess the civil penalties that Congress has determined are necessary to deter mismanagement of plan assets. See Pet. App. 24a-27a (discussing proceedings in this case).[13]

2. The Ficklings also argue that 29 U.S.C. 1132(a)(5) does not authorize the Secretary to seek equitable relief against a nonfiduciary party in interest who has engaged in a transaction prohibited by 29 U.S.C. 1106(a).

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[13] The Ficklings also argue (98-758 Pet. 19-21) that the Secretary's suit should be precluded because the *Knop* litigation was brought as a class action and resulted in judicial approval of a class settlement pursuant to Rule 23 of the Federal Rules of Civil Procedure. That rule in fact cuts against the Ficklings' argument, because it requires adequate representation, see Fed. R. Civ. P. 23(a)(4), and the named plaintiffs in *Knop* did not even purport to represent the Secretary's interests. See *Fitzsimmons*, 805 F.2d at 693 n.13. The Ficklings also erroneously accuse the Secretary of "willfully avoid[ing]" the class action fairness hearing after stating that the Secretary did not want to impede approval of the private settlement. 98-758 Pet. 21. As discussed above (see pp. 4-5, *supra*), however, the Secretary made it quite clear to the private litigants (and through them to the district court) that she was continuing to investigate and would not be bound by any settlement.

98-758 Pet. 22-28. The court of appeals correctly rejected that contention (Pet. App. 9a-17a), as has every other court of appeals that has addressed the issue. This Court has previously denied review in a case raising a similar challenge to the Secretary's authority under Section 1132(a)(5), and there is no reason for a different result here. See *Stangl* v. *Reich*, 519 U.S. 807 (1996).

a. By its terms, Section 1132(a)(5) authorizes the Secretary to bring an action:

> (A) to enjoin any act or practice which violates any provision of this subchapter [29 U.S.C. 1001-1191c], or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter.

The term "redress" means "the setting right of what is wrong." *The Random House Dictionary of the English Language* 1203 (1966); see also *Webster's Third New International Dictionary* 1904 (1976). And the equitable relief "appropriate" to obtain such redress "includes restitution of ill-gotten plan assets or profits." *Mertens* v. *Hewitt Assocs.*, 508 U.S. 248, 260 (1993).

Section 1106(a) is within the relevant subchapter of the United States Code (codifying Title I of ERISA). It prohibits a plan fiduciary from causing a plan to engage in certain enumerated transactions with (or benefitting) "part[ies] in interest." 29 U.S.C. 1106(a); see 29 U.S.C. 1002(14) (defining "party in interest"). Among other things, it prohibits the sale, transfer, or exchange of plan assets between a plan and a party in interest. 29 U.S.C. 1106(a)(1)(A) and (D). In making such transactions illegal per se, Congress sought "to bar categorically * * * transaction[s] that [were] likely to injure the pension plan." *Commissioner* v. *Keystone*

Consol. Indus., Inc., 508 U.S. 152, 160 (1993). In this case, the Secretary alleges that the February 1990 stock transaction between the ESOP and the Ficklings violated Sections 1106(a)(1)(A) and (D). See Pet. App. 7a. The Secretary's action against the Ficklings is an action for "appropriate equitable relief" (the disgorgement of tens of millions of dollars in wrongful profits) to redress that violation, and to enforce the Act's prohibition against transactions between a plan and a party in interest.

Petitioners point out (98-758 Pet. 24-25) that Section 1106(a) imposes the duty to avoid prohibited transactions on the fiduciary, rather than on participating parties in interest. They suggest, however, no persuasive reason why Congress, in authorizing the Secretary to obtain redress for prohibited transfers of plan assets to parties in interest, would have intended to limit that authority in a way that would prevent the Secretary from recovering those assets from the party who received them.[14] To the contrary, Section 1132(a)(5) is a broadly-worded, "catchall" provision that acts "as a safety net, offering appropriate equitable relief for injuries caused by violations that [Section 1132] does not elsewhere adequately remedy." *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996); see also Pet. App. 10a-13a (contrasting Section 1132(a)(5), which

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[14] The Ficklings incorrectly assert that the government, in its amicus curiae brief in *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996) (No. 95-809), "conceded" that "Title I of ERISA" speaks only to the lawfulness of fiduciary conduct, rather than to the lawfulness of particular transactions. 98-758 Pet. 24. It suffices to point out that the government's brief in *Spink* expressly argued that Section 1132(a) authorizes equitable relief against parties in interest. 95-809 U.S. Br. 3 n.3. This Court noted but reserved the question. 517 U.S. at 889 n.3.

provides only equitable relief but does not limit the persons who can be sued, with Section 1132(a)(2), which permits claims for broader relief, but only against fiduciaries). Because the "act or practice" of engaging in a transaction prohibited by Section 1106(a) by definition requires the participation of a party in interest, authorization of an action to provide equitable relief "to redress such [a] violation" and to "enforce" the prohibition necessarily includes authorization of relief against such parties. 29 U.S.C. 1132(a)(5); see, *e.g.*, *Reich* v. *Stangl*, 73 F.3d 1027, 1031 (10th Cir.) (contrary result would "create a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions"), cert. denied, 519 U.S. 807 (1996); *Nieto* v. *Ecker*, 845 F.2d 868, 874 (9th Cir. 1988) ("Courts may find it difficult or impossible to undo such illegal transactions unless they have jurisdiction over all parties who allegedly participated in them."). Indeed, even if the statutory language were amenable to differing interpretations, it is hard to conceive of "any ERISA-related purpose that denial of a remedy would serve." *Varity Corp.*, 516 U.S. at 515.

Petitioners also contend (98-758 Pet. 24-28) that Congress limited the Secretary of Labor's enforcement authority under Title I of ERISA to actions against fiduciaries, delegating to the Secretary of the Treasury the sole authority to proceed against parties in interest through the assessment of excise taxes. The tax treatment of prohibited transactions instead supports the Secretary's position. Before imposing an excise tax on a party in interest, the Secretary of the Treasury must provide the Secretary of Labor with an opportunity to obtain "correction" of the prohibited transaction.

26 U.S.C. 4975(h).[15] The term "correction" is defined as "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." 26 U.S.C. 4975(f)(5). The clear implication of those provisions is that the Secretary of Labor has the authority to seek equitable relief against a party in interest when such relief is necessary to "correct[]" the prohibited transaction.[16]

b. As petitioners acknowledge, every court of appeals that has considered the issue has rejected petitioners' constricted interpretation of Section 1132(a)(5). See 98-758 Pet. 9-10 & n.7, 23; Pet. App. 9a-17a; *LeBlanc* v. *Cahill*, 153 F.3d 134, 149-153 (4th Cir. 1998); *Stangl*, 73 F.3d at 1030-1031; *Landwehr* v. *DuPree*, 72 F.3d 726, 734-735 (9th Cir. 1995); *Reich* v. *Compton*, 57 F.3d 270, 285-287 (3d Cir. 1995); see also *Reich* v. *Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994) (dicta).[17] Petitioners

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[15] The Internal Revenue Code refers to "disqualified person[s]," but the definition of that term is substantially equivalent to the definition of "party in interest." Compare 26 U.S.C. 4975(e)(2) with 29 U.S.C. 1002(14).

[16] Petitioners also cite legislative history in support of their position. 98-758 Pet. 26-27. While that history may indicate that "the fiduciary is the main focus of the prohibited transaction rules" under Title I of ERISA, H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 306 (1974), it does not suggest that Section 1132(a)(5) provides no "other appropriate equitable relief" against nonfiduciary parties in interest. See *Stangl*, 73 F.3d at 1032-1034.

[17] Petitioners argue (98-758 Pet. 10, 23) that the Fourth Circuit's recent decision in *LeBlanc* evinces "increasing disarray" among the courts of appeals because it imposes liability on nonfiduciaries who participate in transactions prohibited by Section 1106(b)—which does not require the involvement of a "party in interest"—as well as transactions prohibited by Section 1106(a).

nevertheless contend (98-758 Pet. 24) that this Court's review is necessary in order to "reaffirm" the "basic teaching" of *Mertens* v. *Hewitt Associates*. *Mertens*, however, supports the decision below.

Mertens held that Section 1132(a)'s provisions authorizing "other appropriate equitable relief" do not authorize the award of money damages. 508 U.S. at 251-262. In reaching that conclusion, the Court also questioned whether ERISA authorized the award of *any* relief against a nonfiduciary who merely knowingly participated in a fiduciary's breach of duty. But the Court recognized that some provisions of ERISA, including 29 U.S.C. 1106(a), could be read to impose particular obligations on nonfiduciaries; and, indeed, the *Mertens* opinion expressly states that a service provider (normally a party in interest, but not a fiduciary) must disgorge assets and profits obtained through participation as a party in interest in transactions prohibited by Section 1106. *Id.* at 253-254 & n.4, 262. Thus, the court of appeals correctly read *Mertens* to support the Secretary's action for similar relief against the Fickling petitioners. Pet. App. 14a-17a; see also *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 889 n.3 (1996)

They also cite the Seventh Circuit's rejection, in *Reich* v. *Continental Casualty Co.*, 33 F.3d 754, 757 (1994), cert. denied, 513 U.S. 1152 (1995), of a construction of Section 1132(a) that would impose liability on any party that "knowingly participated" in any breach of fiduciary duty. Nothing in the decision below, however, is inconsistent with the holding in *Continental Casualty* (see Pet. App. 11a-13a, distinguishing the court of appeals' previous decision in *Useden* v. *Acker*, *supra*, which is consistent with *Continental Casualty*); and any additional issue raised in *LeBlanc* is irrelevant to this case, which involves only parties in interest whose liability is predicated on participation in transactions prohibited under Section 1106(a).

(noting that a number of courts of appeals have so read *Mertens*, and reserving the question). In the absence of any disagreement among the courts of appeals, that issue does not warrant further review by this Court.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-762

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

SOUTH CAROLINA NATIONAL BANK,
Petitioner,
v.
ALEXIS M. HERMAN,
Secretary of the United States Department of Labor,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

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IN THE

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SOUTH CAROLINA NATIONAL BANK,
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v.

ALEXIS M. HERMAN,
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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY TO BRIEF IN OPPOSITION

The Eleventh Circuit Decision Conflicts With Decisions of This Court and Other Courts of Appeals Recognizing That a Government Agency Is Bound by the Doctrine of Representative Claim Preclusion When the Agency Sues in a Representative Capacity.

Petitioner South Carolina National Bank ("SCNB"), as trustee of an employee stock ownership plan ("ESOP"), allegedly overpaid for shares of the sponsoring employer's stock that it had purchased for the accounts of participating employees. App. 3a-4a. The participants sued and resolved the overpayment question by agreeing, in a court-approved class action and derivative action settlement agreement, to accept $12.3 million in cash payable to the ESOP, plus other consideration. R3-75, R-4-99, R4-100. In a subsequent lawsuit against SCNB, respondent, the Secretary of the United States Department of Labor (the "Secretary"), sought injunctive and declaratory relief for the benefit of the public at large, as she is entitled to do under section 502(a)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132 (a)(5) (1994 & Supp. II 1996), in order "to determine

the legality of specific conduct and to prevent those who have engaged in illegal activity from causing loss to *any* future ERISA plan participant." *Donovan v. Cunningham*, 716 F.2d 1455, 1462 & n.10 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984) (private parties' adjudication does not bar the Secretary from bringing a subsequent enforcement action for equitable relief, although it may nonetheless affect "the scope of relief" available to the Secretary) (emphasis in original).

But respondent now says that the government also should be allowed a second claim against SCNB, under sections 502(a)(2) and 409(a) of ERISA, 29 U.S.C. §§ 1132(a)(2), 1109(a), to recover more money for the ESOP and its participants. Nowhere, however, does respondent advance any colorable explanation as to why Title I of ERISA, alone in the remedial scheme of federal law, authorizes this second bite at the apple.

Federal law often allows the government to enforce both a private right of recovery and a public right to broader equitable relief.[1] The government can sue, for example, to force a company to stop applying racial, sex, age, or disability criteria in its hiring decisions. *See, e.g.*, 42 U.S.C. § 2000e-5(f), (g) (civil actions and remedies under Title VII). As an adjunct to that power, the government can also recover monetary relief, payable to the individual victims of such discrimination, to compensate them for the effects of the unlawful conduct. *Id.* But none of these remedial schemes allows the government, or the wronged individuals, to have a second try at recovering the victim's losses. *See, e.g., EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1289-93 (7th Cir. 1993) (although prior adjudication by grievant under Title VII and ADEA does not bar government from seeking injunctive relief to

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[1] *See, e.g.*, Federal Trade Commission Act § 206(a), (b), 15 U.S.C. § 57b(a), (b); Age Discrimination in Employment Act of 1967 ("ADEA") § 7(b), 29 U.S.C. § 626(b); Title VII of the Civil Rights Act of 1964 ("Title VII") § 706, 42 U.S.C. § 2000e-5 (1994); Americans with Disabilities Act of 1990 § 107(a), 42 U.S.C. § 12117.

benefit the public interest, it does bar the government from seeking more money for the grievant); *FTC v. AMREP Corp.*, 705 F. Supp. 119, 124 (S.D.N.Y. 1988) (to the same effect with respect to claim under Federal Trade Commission Act).

In this case, the Eleventh Circuit ruled that the government can make a second try for money damages payable to the settling participants' ESOP. The court of appeals decided that the government is never barred from making a second claim for private monetary relief when "the government's action seeks to enforce a federal statute that implicates both public and private interests." App. 22a.

As shown in SCNB's petition, the Eleventh Circuit's decision in this respect is in direct conflict with this Court's decision in *Chicago, Rock Island and Pacific Railway Co. v. Schendel,* 270 U.S. 611 (1926), and with decisions of other circuit courts of appeals in, among others, *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998); *Harris Chernin, Inc.*, 10 F.3d 1286; *In re Imperial Corp.*, 92 F.3d 1503 (9th Cir. 1996); and *EEOC v. United States Steel Corp.*, 921 F.2d 489 (3d Cir. 1990).

In *Schendel*, the Court observed that "where a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication by a state court in a suit against [the private party] personally, determining the same issues, was available as an estoppel against the government." 270 U.S. at 619. In *Kidder, Peabody & Co., Harris Chernin, Inc., and United States Steel Corp.*, among others, the courts of appeals have applied this bedrock principle of law to disputes arising under other federal statutes, including Title VII and the ADEA. These decisions uniformly hold that a private settlement or adjudication by a private person bars the government agency from later suing to recover additional money for the private person, even though, as here, the government remains free to sue for broader equitable relief to benefit the public interest by enjoining unlawful activity. *Kidder, Peabody & Co.*, 156 F.3d at

301-02; *Harris Chernin, Inc.*, 10 F.3d at 1289-93; *United States Steel Corp.*, 921 F.2d at 493-97.

Respondent tries without success to explain this conflict away. She acknowledges, as she must in the wake of *Schendel*, that preclusion can apply when the government sues in a representative capacity to enforce a private right of recovery only. *See* Respondent's Brief in Opposition at 16-17 (asserting that the "clear premise" in *Schendel* was that the government sued "for the sole benefit" of the private person). But respondent contends that when the government sues to enforce both a private right of recovery and a public right—or in respondent's words, when the government "represents *more* than merely private interests"—there is no preclusion whatsoever, even as to the private right of recovery. Respondent's Brief in Opposition at 17 (emphasis in original).

Respondent's contention finds no support in this Court's prior decisions. Indeed, as shown in SCNB's petition, each of the Court's decisions that the Eleventh Circuit relied upon involved a case where the government sued to enforce a public right only and that right was separate from the private claim resolved by the prior adjudication. *See* 98-762 Pet. 12-15 (discussing *Hathorn v. Lovorn*, 457 U.S. 255 (1982); *City of Richmond v. United States*, 422 U.S. 358 (1975); and *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683 (1961)). The two additional decisions from this Court that respondent cites at page 11 of her brief in opposition, *Durfee v. Duke*, 375 U.S. 106 (1963), and *Mississippi v. Louisiana*, 506 U.S. 73 (1992), are not materially different. They address the preclusive effect of a final judgment rendered in a quiet title action brought by the resident of one state against the resident of an adjacent state. In each case, this Court observed that the private parties' adjudication of their individual property interests would not bind the two states, in their sovereign capacities, from contesting the boundary between them. *Durfee v. Duke*, 375 U.S. at 115; *Mississippi v. Louisiana*, 506 U.S. at 78. The decisions do not hold, as respondent seems to suggest, that the states could

sue anew to enlarge the property rights of the losing private litigant. In fact, the Court expressly noted in *Mississippi v. Louisiana* that the lower courts had mistakenly "intermixed the questions of title to real property and of the location of the state boundary." *Id.* at 78.

Respondent's contention that there is no preclusion when the government sues to enforce both a public right of action and a private right of recovery is directly at odds with *Kidder, Peabody & Co.*, 156 F.3d 298; *Harris Chernin, Inc.*, 10 F.3d 1286; and *United States Steel Corp.*, 921 F.2d 489, among others. In *United States Steel Corp.*, for example, the EEOC observed that its authority to sue under the ADEA benefited both the public interest and the private interest of the individual victim of age discrimination. From this, the agency argued that a prior adjudication of the individual's claim did not preclude the agency, in any respect, because the agency had a "broader independent public interest different from that of an individual grievant." 921 F.2d at 496. The Third Circuit, however, squarely rejected that contention:

> The Commission's description of its enforcement role under the ADEA is accurate and important, but this description fails to distinguish between the EEOC's role in protecting the public interest and its role in vindicating specific private claims. . . . [W]hen the Commission seeks individualized benefits under the ADEA for particular grievants . . . the Commission functions to that extent as their representative, and the doctrine of representative claim preclusion applies.

Id.; see Kidder, Peabody & Co., 156 F.3d at 301-302; *Harris Chernin, Inc.*, 10 F.3d at 1289-1293; *EEOC v. Cosmair, Inc.*, 821 F.2d 1085, 1091 (5th Cir. 1987); *EEOC v. Goodyear Aerospace Corp.*, 813 F.2d 1539, 1542-1543 (9th Cir. 1987), all to the same effect.

Respondent argues that these decisions of the Second, Third, Fifth, Seventh, and Ninth Circuits are distinguishable because the enforcement schemes in the ADEA and Title VII require private claimants first to notify the

agency of their grievances and then to await some agency action (*e.g.*, issuance of a "right to sue" letter under Title VII) before suing. According to respondent, "the EEOC's mandatory pre-litigation involvement, and its large degree of control over the initiation of private litigation, may justify according such litigation some limited preclusive effect with respect to later public suits." Respondent's Brief in Opposition at 19.

But this is no distinction at all. Like Title VII and the ADEA, Title I of ERISA requires private claimants to notify the government of their grievances. Specifically, section 502(h) of ERISA requires private plaintiffs to serve a copy of their complaint on both "the Secretary and the Secretary of the Treasury." 29 U.S.C. § 1132(h). Like Title VII and the ADEA, Title I of ERISA also gives the government agency an opportunity to take action, in its own name, to pursue the individuals' grievances and to obtain a private remedy on their behalf. Specifically, section 502(h) authorizes the Secretary to intervene as a matter of right in any private litigation commenced under section 502(a)(2) of ERISA. And where, as here, the private litigation is maintained as a class action or derivative action under Rule 23 or 23.1 of the Federal Rules of Civil Procedure, there is a fairness hearing on any proposed settlement. In sum, the Secretary has no less "involvement" and "control" with respect to claims for private relief under sections 502(a)(2) and 409(a) of ERISA than the EEOC has with respect to complaints brought under Title VII or the ADEA.[2]

More important, the degree of government control and involvement is not what matters under the claim preclu-

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[2] To say that the EEOC exercises "control" over the initiation of private litigation is an overstatement. For example, after a Title VII charge has been pending with the agency for a minimum number of days, and if the grievant wishes to commence a private lawsuit, the EEOC's regulations mandate that the agency "shall promptly issue" a right-to-sue letter to the grievant, 29 C.F.R. § 1601.28(a), even though the agency's investigation continues.

sion doctrine applied by this Court in *Schendel* and by the courts of appeals in *Kidder, Peabody & Co., Harris Chernin, Inc.*, and *United States Steel Corp.* As this Court explained in *Richards v. Jefferson County*, 517 U.S. 793 (1996), a non-party can be precluded on at least two different and independent bases—either because the nonparty exercised "control of litigation on behalf of one of the parties in the litigation," *id.* at 798 (quoting *Montana v. United States*, 440 U.S. 147, 154 (1979)), or because "it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards v. Jefferson County*, 517 U.S. at 798. The first of these bases applies when the non-party's interest is different from the litigant's, but the non-party is treated as if his interest had been represented in the litigation because of control over it. The latter of the bases—privity of interest—applies when the non-party and the actual litigant have, in substance, an identity of interest. Privity, as respondent correctly observes, "is essentially a matter of identity of interests." Respondent's Brief in Opposition at 10 (citing *Richards v. Jefferson County*, 517 U.S. at 798). It is not defined by the degree of control that the non-party exercised over the prior litigation.

The decisions in *Schendel, Kidder, Peabody & Co., Harris Chernin, Inc.*, and *United States Steel Corp.* turn on the identity of interest between the government agency and the individuals for whom it sought money, not on the degree of control that the agency exercised over the individuals' private claims. As the Seventh Circuit summarized in *Harris Chernin, Inc.*, for example, claim preclusion applies to EEOC claims for monetary relief because "there is privity between the EEOC and individuals for whom it seeks individual benefits." 10 F.3d at 1291.

This rule of representative claim preclusion, moreover, is not confined to cases brought by the EEOC under Title VII or the ADEA. It extends to all cases in which the

government seeks money on behalf of private parties, as illustrated by the cases cited at pages 11-12 of SCNB's petition and pages 14-15 of the petition in No. 98-758.

Likewise, *Schendel* makes clear that the preclusive effect of a prior adjudication is not constrained by the statutory or common-law source of the government's claim for relief. Rather, the effect is controlled by the fact that the government and private individual have, in substance, an identity of interest. Where they do, the government is bound by the prior adjudication of the private right, regardless of whether the government is suing under a specific statute or in furtherance of its general right to sue. The controlling question, in short, is not whether the government is invoking a particular statute, but whether there has been a "previous adjudication[] against the real party in interest." *Schendel*, 270 U.S. at 619. If there has been, "the government should be held estopped." *Id.*

Recognizing this, respondent resorts to disputing that the injured plan and its participants are the real parties in interest with respect to a claim for money damages under sections 502(a)(2) and 409(a) of ERISA, 29 U.S.C. §§ 1132(a)(2), 1109(a). Respondent argues in particular that, when the government is the one bringing a claim for money damages under those sections, the government acts in pursuit of interests that "transcend" those of the plan and its participants. Respondent's Brief in Opposition at 12.

Yet, respondent concedes that any and all money damages recovered under those sections would be paid over to the ESOP and ultimately to its participants—here, the very same participants whose identical claims were resolved by the final consent judgment in the *Knop* action —and that under *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985), claims brought by the Secretary under section 502(a)(2) of ERISA, 29 U.S.C. § 1132(a)(2), are "brought in a representative capacity on behalf of the plan as a whole." Respondent's

Brief in Opposition at 14 (quoting *Russell*, 473 U.S. at 142 n.9). On this point, *Russell* states unequivocally:

> Inclusion of the Secretary of Labor [as one of the four classes of plaintiffs authorized to sue under 502(a)(2)] is indicative of Congress' intent that [such] actions . . . be brought in a representative capacity on behalf of the plan as a whole. Indeed, the common interest shared by all four classes [of plaintiffs] is in the financial integrity of the plan. . . . And the entire text of § 409 persuades us that Congress did not intend that section to authorize any relief except for the plan itself.

Russell, 473 U.S. at 142 n.9, 144.

Respondent's contention that public interests are always at stake when the government sues proves too much. The public's interest in enforcing ERISA is surely no more important than that of the EEOC in enforcing Title VII and the ADEA, yet it is undisputed that representative claim preclusion applies to the EEOC (and to other agencies) in analogous circumstances. Indeed, under respondent's theory, it could equally be said that public interests are at stake whenever any private person sues under a statutory or common law rule of general applicability, because adjudication of the private claimant's suit also will help to establish precedent and to deter other wrongdoers. But these results—common to all litigation—do not eliminate the preclusive effect of the individual adjudication, nor do they affect the representative claim preclusion analysis described by the Court's decision in *Schendel* and by the Second, Third, and Seventh Circuit's decisions in *Kidder, Peabody & Co.*, 156 F.3d 298; *Harris Chernin, Inc.*, 10 F.3d 1286; and *United States Steel Corp.*, 921 F.2d 489.[3]

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[3] Respondent observes that section 502(l) of ERISA, 29 U.S.C. § 1132(l), allows her to assess a civil penalty on any amount recovered under a judgment or settlement to which she is a party. Respondent's Brief in Opposition at 13. But nothing in section 502(1) trumps the fundamental claim preclusion rules that undergird the nation's laws generally. By its plain terms, section 501(1)

The Eleventh Circuit's decision not only creates an irreconcilable conflict with *Schendel, Kidder, Peabody & Co., Harris Chernin, Inc., United States Steel Corp.*, and similar decisions, but it also threatens the sound administration of justice by undermining the ability of private claimants to obtain recovery on their own behalf. If, as the Eleventh Circuit states, a government claim for monetary relief on behalf of a private person is not precluded "when the government's action seeks to enforce a federal statute that implicates both public and private interests," then private litigants necessarily suffer. Defendants in the future will either not settle litigation brought by a private party unless the government also participates (as respondent refused to do in the *Knop* class action here) or, if defendants do settle, they will settle for less money in order to reflect the risk that the government may initiate a second monetary claim later. Either way, this result takes away from private claimants—the very persons who suffered the pecuniary injury—what it purports to give the government. This result cannot be reconciled with a statutory enforcement scheme, like ERISA's, that gives private claimants authority to seek redress on their own behalf.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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applies only when there is an action to be brought by the Secretary of Labor, not when the plan participants whose money is actually at stake have extinguished the plan's claim for money in a private litigation. Properly understood, section 502(1) is merely the added cost of being on the losing side of a government lawsuit, and thus operates to encourage private resolution of ERISA disputes.